Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1999

AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioner,

v.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether trial court orders that (a) purport to vitiate a litigant's attorney-client privilege on grounds of "fraud," (b) require the litigant to provide its adversary with all past and future attorney-client communications in connection with pending appeals that are directed to the foundations of the "fraud" order, and (c) refuse any stay of the "fraud" order pending the resolution of such appeals, deny the litigant due process of law and its rights to counsel and to access to the courts under the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption of this petition identifies all parties in the Supreme Court of the State of California. Petitioner American Motorists Insurance Company has one parent corporation, Lumbermens Mutual Casualty Company, and two nonwholly owned subsidiary corporations, BBG Associates, Inc. and KAAL PGA Sales, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT STATUTORY PROVISION	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. Course of Proceedings Below	4
C. The Decisions Below	6
D. Jurisdiction	7
REASONS FOR GRANTING THE PETITION	9
REVIEW IS NECESSARY TO PRESERVE CIVIL DEFENDANTS' RIGHT TO ASSERT AFFIRMATIVE DEFENSES WITHOUT FORFEITING PRIVILEGED COMMUNICATIONS WITH COUNSEL OR ACCESS TO APPELLATE REVIEW	10
1. A Ruling Which Deprives Litigants of Confidential Communications With Counsel For Raising An Affirmative Defense Unlawfully Interferes With Their Right to Counsel	10
2. A Ruling Which Deprives Litigants Of Access To Counsel While Appellate Review Is Pending Unlawfully Obstructs Their Right Of Access To The Courts	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973)	16
American Airways Charters, Inc. v. Regan, 746 F.2d 865 (D.C. Cir. 1984)	11, 12
Asermely v. Allstate Ins. Co., 728 A.2d 461 (R.I. 1999)	15
Baird v. Koerner, 279 F.2d 623 (9th Cir. 1983)	12
Cavallo v. Star Enterprise, 1998 U.S. App. LEXIS 15114 (4th Cir.1998)	11
Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159 (2d Cir. 1992)	12
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	7
In re Cherney, 898 F.2d 565, 569 (7th Cir. 1990)	12
In re Salem Suede, Inc., 219 B.R. 922 (Bankr. D.Mass. 1998)	15
Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982)	16
Mosley v. St. Louis Southwestern Railway, 634 F.2d 942 (5th Cir. 1981)	11
Porter v. Califano, 592 F.2d 770 (5th Cir. 1979)	16
Potashnick v. Port City Construction Co., 609 F.2d 1101(5th Cir.), *cert. denied*, 449 U.S. 820 (1980)	16
Powell v. Alabama, 287 U.S. 45 (1932)	11
Tahoe Regional Planning Agency v. McKay, 769 F.2d 534 (9th Cir. 1985)	12
Upjohn Co. v. United States, 449 U.S. 383 (1981)	14

TABLE OF AUTHORITIES—*(Continued)*

Statutes Page

United States Constitution:
Amendment V 11
Amendment XIV 11
28 U.S.C. § 1257 ..... 2, 7-8
Fed. Rule Civ. Pro. 12(b) 13

Miscellaneous

Federal & State Insurance Week, "New York Bill Would Allow Bad-Faith Claims" (May 4, 1998) 15

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Laurence H. Tribe, *American Constitutional Law*, § 10-18 (2d ed. 1988) 16

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The National Underwriter Company National Underwriter, Property & Casualty/Risk & Benefits Management Edition, "California Senate Votes To Reinstate Royal Globe," (June 14, 1999) 14

Timothy Benn Publishing Limited Post Magazine, "Guest Comment; All in Bad Faith," (May 13, 1999) 15

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PETITION FOR A WRIT OF CERTIORARI

American Motorists Insurance Company ("AMICO") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The order of the Supreme Court of California is unpublished and reprinted in the appendix hereto ("Pet. App.") beginning at Pet. App. 1a. The order of the Superior Court for Los Angeles County requiring that AMICO produce all past and future attorney-client privileged documents, including all communications between AMICO and its counsel, is unpublished and reprinted here at Pet. App. 6a. The order entered by the Court of Appeal, Second Appellate District, Division

Seven, denying AMICO's Petition for a Peremptory Writ of Mandate or Other Appropriate Relief is unpublished and reprinted here at Pet. App. 2a. The Superior Court's order refusing to stay enforcement of the discovery ruling pending disposition of ongoing related appeals is unpublished and reprinted here at Pet. App. 12a.

JURISDICTION

The judgment of the Supreme Court of California was entered on April 21, 1999, Pet. App. at 1a, and a timely petition for a writ of certiorari is being filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall *** be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law ***."

STATEMENT OF THE CASE

A. Introduction

This case presents important issues concerning the viability of the attorney-client privilege for defendants in insurance coverage and other civil cases where "bad faith" claims are recognized who risk waiving the privilege merely by asserting an affirmative defense. AMICO is a liability insurer which is the subject of suits claiming insurance coverage and damages for "bad faith." On December 11, 1998, the Superior Court for Los Angeles County, per the Honorable Joseph R. Kalin, held that Montrose had made out a *prima facie* case that AMICO, in the "bad faith" action and related coverage actions,[1] had

1. The "bad faith" case out of which the trial court's discovery order arose is captioned *Montrose Chemical Corp. of California v. American Motorists Insurance Company, et al.*, Case No. BC 130486 ("Montrose v. AMICO"). There are four related insurance coverage cases, also pending in Los Angeles County Superior Court: *Montrose Chemical Corp. of Califor-*

fraudulently advanced a meritless defense that Montrose is not insured under certain AMICO policies – *i.e.*, that AMICO groundlessly contended that it did not insure Montrose while knowing that, in fact, it did. The trial court also held that Montrose had made out a *prima facie* case that AMICO had employed its counsel to further this allegedly fraudulent "named insured" position. On these "premises," Judge Kalin ruled that AMICO had waived any right to maintain a privilege for attorney-client communications relating to the "named insured" issue.

Prior to seeking appellate review of the December 11 Order, AMICO asked Judge Kalin to stay that order pending the resolution of two ongoing appeals in the related *Canadian II* and *Canadian III* coverage litigations.[2] Each of these appeals presents the question whether Judge Kalin erred in reaching the fundamental conclusion that underpins his December 11 Order – namely, that AMICO's "named insured" defense lacks merit. Assuming AMICO prevails on these appeals, as it believes it will, and Judge Kalin's summary adjudications of the "named insured" issue are reversed, the Court of Appeal will have determined that the very evidence that Judge Kalin deemed sufficient as a matter of law to establish that AMICO insures Montrose would, in fact, permit a jury to reach the opposite conclusion. Such a determination would wholly undermine Judge Kalin's December 11 Order since it would be completely incongruous to hold that the evi-

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nia v. Canadian Universal Ins. Co., et al., Case No. C 594148 (consolidated with Case No. C 597389) ("Canadian I"); *Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., et al.*, Case No. BC 005158 ("Canadian II"); *Montrose Chemical Corp. of California v. The Travelers Indemnity Co., et al.*, Case No. BC 077158 ("Canadian III"); and *Montrose Chemical Corp. of California v. The Travelers Indemnity Co., et al.*, Case No. BC 164315 ("Canadian IV").

2. The two appeals before the Court of Appeal, Second Appellate District, are styled *Montrose Chemical Corp. of California v. American Motorists Ins. Co.*, 2nd Civil Case No. B122750 (appeal from the Superior Court for Los Angeles County, Case No. BC005158 (*Canadian II*), and *Montrose Chemical Corp. of California v. American Motorists Ins. Co.*, 2nd Civil Case No. B122893 (appeal from the Superior Court for Los Angeles County, Case No. BC077158 (*Canadian III*).

dence supports the conclusion that AMICO "knew" something to be a fact that a jury could properly determine *not* to be a fact.

Notwithstanding, on January 13, 1999, Judge Kalin denied AMICO's motion to stay the December 11 Order pending resolution of the *Canadian II* and *Canadian III* appeals. Judge Kalin's ruling thus operates to deprive AMICO of its right to communicate confidentially with counsel in seeking reversal of Judge Kalin's "named insured" decisions. At a conference on December 15, 1998, Judge Kalin confirmed that the December 11 Order contemplates that AMICO share all of its attorney-client privileged communications concerning the principal issue involved in the ongoing appeals — and the issue upon which the "fraud" order is founded — with Montrose, AMICO's adversary, *while the appeals are pending*. This petition seeks certiorari review not of the propriety of the trial court's ruling itself, but rather of the procedural means by which the court enforced its ruling in a manner calculated to deprive AMICO of the benefit of counsel in prosecuting pivotal appeals.

B. Course of Proceedings Below

This action, and the related coverage actions, involve as to AMICO claims arising out of or that necessarily derive from Montrose's contention that it is a "named insured" under AMICO Policies. Three of the actions — the "bad faith" suit and the *Canadian II* and *Canadian III* coverage cases — are pending before Judge Kalin. A brief account of the proceedings before him on the "named insured" issue is in order.

AMICO issued certain general liability insurance policies to the former Stauffer Chemical Company covering the period January 1, 1969 to March 1, 1971 ("the AMICO Policies"). The AMICO Policies define the "named insured" to be Stauffer and its "owned or controlled subsidiaries, affiliated companies or other corporations now existing or hereafter created." At relevant times, Stauffer and another company, Chris-Craft Industries, Inc. each held 50% of Montrose's shares, but Stauffer has never wholly owned Montrose. At the outset of the litigation regarding AMICO's disputed coverage

obligations, AMICO raised the affirmative defense that Montrose is not insured under the foregoing definition.

In one of the related coverage litigations, *Canadian III,* Judge Kalin ruled on November 30, 1995, that Montrose was a "named insured" under the AMICO Policies based upon the "named insured" definition and Stauffer's 50% share ownership. See Pet. App. at 33a. In an unpublished opinion (which is the law of the case with regard to this dispute), the Court of Appeal noted that the Supreme Court of California had rejected Montrose's "policy language + 50% share ownership" argument in its landmark decision in *Montrose Chemical Corp. v. Superior Court,* 6 Cal. 4th 287, 294 n.3, 861 P.2d 1153, 1156 n.3, 24 Cal. Rptr. 2d 467 (1993); the question of whether AMICO insures Montrose is a question of *fact*; and Judge Kalin's summary adjudication in favor of Montrose had been erroneously granted in view of "triable issues of material fact." Pet. App. at 30a.

On remand, Judge Kalin entertained, and once again granted, a "renewed" motion by Montrose seeking summary adjudication of the "named insured" issue. The "renewed" motion was filed as a "consolidated" motion in both *Canadian II* and *Canadian III,* and Judge Kalin's October 28, 1997 decision on that motion, see Pet. App. at 23a, soon became the subject of appeals in those cases. *See supra* at n.2. (Judge Kalin's order became appealable because he subsequently granted Montrose permanent injunctive relief based upon his "named insured" ruling.) Both of AMICO's appeals are currently pending before the Court of Appeal.

On August 17, 1998, Montrose filed a Supplemental Motion to Compel Production of AMICO's Privileged and Non-Privileged Documents and Testimony Relating to the Attorney-Client Privilege ("Fraud Motion") in an effort to obtain AMICO's attorney-client communications relating to the "named insured" issue. AMICO filed its Opposition to Montrose's Fraud Motion on September 16, 1998, and Montrose filed its Reply Brief (and additional accompanying exhibits) on September 29, 1998. With permission from the trial court, AMICO filed a Sur-Reply Brief in Opposition to

Montrose's further exhibits and argument on October 19, 1998. Montrose's Brief in Reply to AMICO's Sur-Reply was filed three days later.

Montrose's motion came before Judge Kalin on October 27, October 28 and November 4, 1998. The trial court refused repeated requests by AMICO to examine Montrose's counsel — who served as Montrose's affiant and witness — in order to challenge Montrose's submissions.

C. The Decisions Below

On November 24, 1998, the trial court issued a minute order granting Montrose's motion to compel production of AMICO's privileged and non-privileged documents, *see* Pet. App. at 3a, and a written order was entered on December 11, 1998. *See* Pet. App. at 6a The December 11 Order requires that AMICO produce to Judge Kalin all attorney-client privileged documents, including all communications between or among AMICO and its counsel, "in any way relating to the 'named insured' issue." The Order provides that Judge Kalin will review all such documents to ensure that no *other* privileges attach, and will then turn them over to Montrose. *See* Pet. App. at pp. 7a, 9-10a; *see also id.* at 15-16a (Transcript of Proceedings 11/24/98) at 49-50 [WR-20731 to 20732] (providing for *in camera* review for work product and other privileges).

At a hearing on December 15, 1998, AMICO objected to the December 11 Order (which the court had entered before AMICO had an opportunity to file objections) on the grounds, among others, that it required AMICO to divulge to Montrose ongoing attorney-client communications in connection with the pending appeals in *Canadian II* and *Canadian III*. Judge Kalin responded:

> See, that's another issue now. I mean, if — that's the continuing bad faith that Montrose is alleging, that years ago you should have followed the court orders, whatever they were at that time and the duty to defend it, *so any appeals on those issues right now would be something that would be producible* *** I don't intend to have discovery of trial preparation [in the "bad faith" case] but I would agree that *if*

> *Montrose is alleging ongoing bad faith that — I'm not cutting that issue off under any circumstances,* counsel. So I'm going to leave the order the way it is.

Judge Kalin later added:

> . . . You've got an issue of trial preparation and you've got an issue of bad faith. . . . *So isn't the continuation of the appeal a possible issue of bad faith?* Pet. App. at 18a, 19a, and 21a.

AMICO filed a motion on January 6, 1999, seeking a stay of the December 11 Order pending resolution of the related appeals in *Canadian II* and *Canadian III*. By order dated January 15, 1999, the trial court denied AMICO's motion. Pet. App. at 12a.

The December 11 Order provided that AMICO could pursue a writ of mandate within 40 days of its entry. AMICO timely filed such a petition on January 20, 1999. The Court of Appeal denied this writ petition on February 19, 1999. Pet. App. at 2a. On March 1, 1999, AMICO filed a petition for review of the Court of Appeal's order in the Supreme Court of California. The California Supreme Court denied the petition on April 21, 1999.

D. Jurisdiction

Although Petitioner contends that this Court's jurisdiction is properly invoked under 28 U.S.C. § 1257, this issue was disputed by respondent in proceedings below in which it urged the lower court not to stay implementation of its order pending review by this Court. Petitioners will, therefore, briefly address the issue. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 474-82 (1975), this Court delineated the circumstances in which it would review a ruling by the highest court of a State notwithstanding the pendency of further proceedings in the lower state courts. The Court found "at least four categories of such cases in which [it] has treated the decision on [a] federal issue as a final judgment for the purposes of 28 U.S.C.

§ 1257 and has taken jurisdiction without awaiting the completion of additional proceedings anticipated in the lower state courts." *Id.* at 477.[3]

The instant case is one "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."[4] *Id.* at 481. As this Court explained, in such cases, if the party seeking review ultimately prevails on the merits, the federal issue will be mooted; whereas if he loses on the merits, the governing state law would prevent him from again presenting his federal claims for review. *Id.* "The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts." *Id.* Since the California Supreme Court issued a final judgment denying review of the trial court's December 11 Order, petitioner cannot seek further review of the federal issue at stake in any further state appel-

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3. The Court's rationale for granting review in such circumstances is that

> in most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' (citation omitted), as well as precipitate interference with state litigation.

Id. at 477.

4. The remaining three categories identified by this Court in *Cox Broadcasting* are: (1) "cases in which there are further proceedings — even entire trials — yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of the further proceedings preordained"; (2) cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; and (3) "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting*, 420 U.S. at 479-82.

late proceedings. Of utmost importance, however, is that *regardless* of whether petitioner prevails or loses in the Court of Appeals on the "bad faith" issue — *i.e.*, the Court determines that AMICO's "named insured" defense was or was not asserted in bad faith — the federal issue regarding deprivation of a civil defendant's right to counsel and access to the courts for asserting certain affirmative defenses will necessarily be mooted because of the trial court's order that AMICO be *immediately* deprived of such rights while the appeals are pending. Moreover, certiorari review of this federal issue will in no manner interfere with future proceedings in the trial court. Accordingly, this case fits squarely within that category of cases specifically prescribed as appropriate for this Court's review.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward issue of genuine procedural and constitutional importance: whether civil defendants that assert affirmative defenses, particularly in areas of the law where "bad faith" claims are recognized, will be forced thereby to forfeit their fundamental Due Process rights to counsel and access to the courts solely for having raised the defense. The trial court's December 11 Order (hereinafter "Order") vitiating AMICO's attorney-client privilege with respect to the "named insured" issue is based on a purported *prima facie* showing that AMICO fraudulently advanced the meritless defense that Montrose is not insured under the relevant AMICO policies. By refusing to stay the Order pending the appeals, the trial court seeks to eviscerate AMICO's access to counsel *before* final resolution of the very issue upon which AMICO's right to counsel depends. Moreover, by forcing AMICO to share all past and future communications with its adversary while the appeals are pending, AMICO is denied any confidential access to its counsel in connection with ongoing appeals that attack the very foundation of the trial court's ruling. This kind of ruling, if allowed to stand, not only deprives defendants of their right to counsel after asserting an affirmative defense, but effectively deters litigants from even raising such defenses for fear that a "bad faith" challenge

might cost them confidential communications with counsel. Given the nationwide increase of bad-faith litigation against insurers, such a chill on defendants' rights to assert affirmative defenses has far-reaching ramifications well beyond the facts of this case.

The trial court Order also operates to deprive AMICO of due process of law by improperly infringing upon its right of access to the courts. The trial court sought to implement its Order in a way deliberately calculated to interfere with AMICO's unquestioned right to challenge the correctness of the "named insured" rulings on which the Order is founded and to insulate those orders from appellate scrutiny. As the court itself conceded, the Order seeks to deny AMICO any past or future confidential access to its counsel notwithstanding the pendency of ongoing appeals that attack the very basis for its decision. AMICO is thus forced to choose between prosecuting the appeals without the benefit of proper counsel or abandoning the appeals and allowing the errors in *Canadian II, Canadian III* and the "bad faith" issue itself to stand uncorrected. This kind of whipsaw, if permitted, would be an enormously effective and convenient device for chilling the rights of litigants to challenge trial court error. No trial court has the power, under the federal constitution and laws, thus to intimidate a litigant in the exercise of its fundamental rights or to inhibit lawful challenges to the court's decisions. Accordingly, this Court's review is necessary to rectify the patent violation of AMICO's constitutional rights to counsel and access to the courts, and to prevent future abuses of trial court discretion in the "bad faith" litigation mounting nationwide.

REVIEW IS NECESSARY TO PRESERVE CIVIL DEFENDANTS' RIGHT TO ASSERT AFFIRMATIVE DEFENSES WITHOUT FORFEITING PRIVILEGED COMMUNICATIONS WITH COUNSEL OR ACCESS TO APPELLATE REVIEW.

1. A Ruling Which Deprives Litigants of Confidential Communications With Counsel For Raising An Affirmative Defense Unlawfully Interferes With Their Right to Counsel.

The Due Process Clauses of the United States Constitution[5] guarantee the right to retained counsel in a civil action. More than 40 years ago this Court affirmed this fundamental right in *Powell v. Alabama,* 287 U.S. 45, 69 (1932):

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

See also, id. at 68 ("What, then does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right.")[6]

Corporations have no less a right to counsel than individuals. Indeed, the constitutional right of counsel is of particular significance where a corporation is involved.

> Corporations may not assert 'purely personal' rights but, no less than natural persons, they are entitled to due process and the equal protection of the laws. . . . In fact, denying a corporation the right to retain counsel may be tantamount to stripping the corporation of its right to defend itself in court, for 'it is established that a corporation, which is an artificial entity that can only act through agents, cannot proceed pro se.'

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5. U.S. Const., Amends. V and XIV.

6. The Circuit Courts of Appeal are, of course, in accord. *American Airways Charters, Inc. v. Regan,* 746 F.2d 865, 873 (D.C. Cir. 1984) ("The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process"); *id.*("While private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights") (citation omitted); *Mosley v. St. Louis Southwestern Railway,* 634 F.2d 942, 945 (5th Cir. 1981) ("This right [to counsel] inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights."); *Cavallo v. Star Enterprise,* 1998 U.S. App. LEXIS 15114, at *9 (4th Cir.1998) ("Although the right to retain counsel in the civil context is not coextensive with that of a criminal defendant, a civil litigant does have a constitutional right to retain counsel.").

American Airways Charters, Inc. v. Regan, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) (*quoting Jones v. Niagara Frontier Transp. Auth.,* 722 F.2d 20, 22 (2d Cir. 1983)).

A corporation's right to counsel necessarily embodies the right to communicate confidentially with counsel. As courts have long recognized, the right to counsel would be meaningless if a party could enjoy it only at the cost of disclosing to the court and its litigation adversary on an ongoing basis the substance of all communications with its retained counsel. *See Baird v. Koerner,* 279 F.2d 623, 629-30 (9th Cir. 1983) ("The purpose of the attorney-client privilege is to protect every person's right to confide in counsel free from apprehension of disclosure of confidential communications."); *In re Cherney,* 898 F.2d 565, 569 (7th Cir. 1990) ("A rule that would permit the government to compel an attorney to disclose her client's identity under circumstances that would reveal the client's confidential communications would have serious consequences for our system of government."); and *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC,* 964 F.2d 159, 165 (2d Cir. 1992) ("In the case of the attorney-client privilege, [], a litigant claiming the privilege would probably prefer almost anyone other than adversary counsel to review the documents in question."). Moreover, as the Ninth Circuit Court of Appeals has observed, where the state has recognized a right to counsel, "there exists a point at which state interference with the presumptive confidentiality of such [attorney-client] communications might implicate constitutional due process." *Tahoe Regional Planning Agency v. McKay,* 769 F.2d 534, 539 n.8 (9th Cir. 1985).

The trial court's orders in this case effectively deny AMICO these constitutional guarantees. The trial court's Order vitiating AMICO's attorney-client privilege with respect to the "named insured" issue is based on a *prima facie* showing that AMICO fraudulently advanced a meritless defense that Montrose is not insured under certain AMICO policies. Pending resolution of this issue by the Court of Appeals, however, there has been no final determination that AMICO's asserted defense is, in fact, invalid. Nor is there any final determination that AMICO knowingly raised the defense in disre-

gard of its objective baselessness. Notwithstanding the uncertainty of these issues, the trial court seeks immediately to eviscerate AMICO's attorney-client privilege as to all past communications on the "named insured" issue. Even more critically, it seeks to deprive AMICO of its right to communicate confidentially with counsel *on an ongoing basis as to future proceedings* which challenge the correctness of the very ruling upon which AMICO's supposed "waiver" depends. The court's Order thus guarantees that AMICO's privilege rights will be irretrievably lost, even if the Court of Appeals subsequently determines that the asserted defense is valid. In essence, the Order effectively penalizes AMICO *merely for having raised the defense* regardless of its potential validity.

This kind of ruling, if permitted to stand, will provide a serious disincentive to asserting affirmative defenses absent an absolute certainty of their success. Faced with the threat of a "bad faith" challenge, litigants will inevitably forego asserting potential defenses rather than risk disclosure of confidential communications to their opponents. Such a result not only undermines the ability of attorneys to zealously represent their clients, but directly contravenes the spirit of the adversarial process which encourages litigants to advance all arguments reasonably likely to succeed. Indeed, affirmative defenses are required to be raised at the outset of litigation — a stage when parties cannot fully ascertain the merits of their position without further factual discovery. *See* Fed. Rule Civ Pro. 12(b) ("Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required. . . .") Requiring defendants to choose between asserting defenses that may deprive them of the benefit of counsel or refrain from raising certain affirmative defenses assures that vigorous defense of civil lawsuits will be compromised.

Arguably, proof that a defense was asserted in bad faith can most easily be obtained from disclosure of privileged documents. However, a trial court ought not be permitted to deprive litigants of the benefit of counsel pending appeal of a *prima facie* determination of bad faith unless the defense is so

improper that *merely raising the defense* is itself so unscrupulous as to warrant loss of the privilege. This is particularly true where the privilege at stake is so vital to fair and effective representation. Indeed, this Court has repeatedly recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law" founded upon "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also id.* ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."). By allowing the trial court's ruling to stand, plaintiffs are afforded a powerful coercive device for defeating certain affirmative defenses simply by resorting to the argument that a defendant acted in bad faith even to raise a particular defense. This result severely inhibits defendants' ability to defend against lawsuits by removing a principle means of disproving allegations, and is thus itself a serious violation of defendants' due process rights.

Moreover, such a result has enormous practical consequences given the nationwide proliferation of "bad faith" insurance litigation. Last month, the California state legislature approved legislation which dramatically expands plaintiffs' abilities to file bad faith lawsuits against insurers.[7] *See*

7. The legislation at issue reinstates a legal doctrine known as "Royal Globe" that the state Supreme Court rejected more than a decade ago because of its dramatic expansion of bad faith lawsuits against insurers. "Royal Globe" – named after the insurance company that figured in the case – was established in March 1979 by the Court in a decision which allowed for the first time a plaintiff to file a bad faith lawsuit against a defendant's insurer over legitimate claims that were delayed or denied. California insurers predict that the legislation will "open the floodgates to contingency-fee-driven litigation that [will] boost the costs of premiums and claims," *see The National Underwriter Company National Underwriter, Property & Casualty/Risk & Benefits Management Edition*, "California Senate Votes To Reinstate Royal Globe," (June 14, 1999), leading to an estimated

The National Underwriter Company National Underwriter, Property & Casualty/Risk & Benefits Management Edition, "California Senate Votes To Reinstate Royal Globe," (June 14, 1999). Similarly, recent legislation now allows accident victims to pursue "third party bad faith" lawsuits against insurance companies of other persons involved in accidents. *See Insurance Accounting,* "N.M.: Claims Bill Criticized," (February 22, 1999).[8] Court decisions also reflect the growing trend towards expansion of bad faith litigation. Last month, the Rhode Island Supreme Court embarked in a major departure from established state law by adopting a "strict liability" standard in bad faith claims settlement cases, *see Asermely v. Allstate Ins. Co.,* 728 A.2d 461 (R.I. 1999); while the Massachusetts U.S. Bankruptcy Court, in a case of first impression regarding an attempt to nullify third-party liability as part of a policy-holder's bankruptcy proceedings, issued a decision "reaffirm[ing] that insurers can be independently liable to third parties for bad faith." *See In re Salem Suede, Inc.,* 219 B.R. 922 (Bankr. D.Mass. 1998).

Against this background, a ruling which erodes insurers' ability to defend against "bad faith" lawsuits virtually ensures an even greater flood of litigation against insurance companies forced to choose between confidential access to counsel and basic affirmative defenses (such as that the claimed insured is a stranger to the insurance policy at issue). Moreover, as insurers increasingly seek ways to compensate for increased exposure to liability, *i.e.* higher premiums, rulings which deprive them of the fair opportunity to litigate such claims guarantee that consumers will ultimately suffer the consequences. Given

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14.5 percent cost increase (approximately $1.5 billion) for all types of liability insurance. *See The National Underwriter Company National Underwriter, Property & Casualty/Risk & Benefits Management Edition,* "California Insurers Prepared To Fight 'Royal Globe" Return," (May 24, 1999).

8. *See also Federal & State Insurance Week,* "New York Bill Would Allow Bad-Faith Claims" (May 4, 1998) (discussing recent legislation in New York State Senate permitting expansion of lawsuits against insurers for bad faith settlement of claims); *Timothy Benn Publishing Limited Post Magazine,* "Guest Comment; All in Bad Faith," (May 13, 1999) ("The American insurance industry has been dominated by bad faith litigation for over a decade.")

the broad implications of the trial court's ruling, the due process issues presented by this petition are worthy of this Court's review.

2. A Ruling Which Deprives Litigants Of Access To Counsel While Appellate Review Is Pending Unlawfully Obstructs Their Right Of Access To The Courts.

The Due Process Clauses of the Constitution also ensure that citizens will have meaningful access to the courts, a right inextricably related to the right to counsel:

> Appellants' interest in speaking freely with their attorneys is interwoven with their right to effective assistance of counsel. 'Meaningful access to the courts is a fundamental right of citizenship in this country.' *Porter v. Califano,* 592 F.2d 770, 780 (5th Cir. 1979). Indeed, all other rights would be illusory without it. *Adams v. Carlson,* 488 F.2d 619, 630 (7th Cir. 1973). Thus, while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights. *See Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-19 (5th Cir.), *cert. denied,* 449 U.S. 820 (1980).
>
> Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems.

Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982)(footnotes omitted).[9]

The trial court's attempt to enforce its Order while the *Canadian II* and *Canadian III* appeals are pending has the purpose and effect of denying AMICO this right of access and leaves this Court faced with a grave systemic challenge. The

---

9. *See also* Laurence H. Tribe, *American Constitutional Law*, § 10-18 at 757 (2d ed. 1988) ("A right to meaningful access to court may also be implicated by denials of adequate legal representation, and even by denials of the legal representation of one's choice.").

trial court sought to interfere with ongoing appeals from its prior rulings in the coverage actions in a way contrived to disrupt the appellate process and, potentially, insulate those rulings from proper appellate consideration. AMICO is thus forced to choose between prosecuting the appeals without confidential access to counsel or abandoning the appeals and allowing the errors in *Canadian II, Canadian III* and the "bad faith" case itself to stand uncorrected. A trial court cannot, consistent with due process, condition continued exercise of AMICO's right to appeal rulings upon forfeiting its attorney-client privilege and the confidential advice and guidance of counsel in those appeals. This is especially true where the rulings on appeal form the very foundation for conclusion that privilege has been "waived."

Moreover, it is not for a trial court to attempt to trump a Court of Appeal or to frustrate the appellate process. A civil case will often involve, on a particular issue, a winner, a loser and an appeal. To permit a trial court, while such an appeal is pending, to rule that the losing party's position is *prima facie* "fraudulent" and require that it immediately forego its privilege during the pendency of its appeal would prove a tremendously effective device for chilling the loser's constitutional and statutory rights to challenge trial court error. It would give a judge a powerful tool to intimidate litigants and to inhibit lawful challenges to his decisions. No trial court has the power, under the constitution, thus to intimidate a litigant in the exercise of its fundamental rights or to inhibit lawful challenges to the court's decisions.

The trial court's orders thus present not only serious constitutional errors, but serious questions of the proper reach of trial court authority in the judicial system. These questions are of concern to all litigants and to this Court, and thus review of these questions are in order.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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Attorneys for Petitioner
American Motorists Insurance Company

July 20, 1999

APPENDIX

Second Appellate District, Division Seven,

No. B128862
S076904

SUPREME COURT
FILED
APR 21 1999
Robert Wandruff Clerk
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

AMERICAN MOTORISTS INSURANCE COMPANY,
Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Real Party In Interest

Petition for review DENIED.

GEORGE
Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

COURT OF APPEAL
- SECOND DISTRICT
FILED
FEB 19 1999
JOSEPH A. LANE Clerk

E. AMOS
Deputy Clerk

AMERICAN MOTORISTS INSURANCE COMPANY,	:	No. B128862
Petitioner,	:	(Super. Ct. No. BC130486)
v.	:	(Joseph R. Kalin, Judge)
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,	:	
Respondent.	:	
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,	:	
Real Party in Interest.	:	

ORDER

THE COURT*:

The court has read and considered the petition for writ of mandate filed herein January 20, 1999, the opposition to the petition filed by the real party in interest January 25, 1999, and the reply thereto filed by petitioner February 10, 1999. The petition is denied.

*LILLIE, P.J.,

JOHNSON, J.,

WOOD, J.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

11/24/98	DEPT. 55
HONORABLE JOSEPH R. KALIN	E.T. ESPINOZA
Judge	*Deputy Clerk*
HONORABLE	ELECTRONIC RECORDING MONITOR
Judge Pro Tem	
G. PADILLA, *Assistant Clerk*	DOLMAN (VIDEO)
Deputy Sheriff	*Reporter*

BC130486

MONTROSE CHEMICAL CORP. OF CALIFORNIA
Plaintiff Counsel

NO APPEARANCES

vs.

AMERICAN MOTORISTS INSURANCE CO.
R/F 10/29/98
Defendant Counsel

r/t BC005158

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court having taken MONTROSE'S MOTION TO COMPEL PRODUCTION OF AMERICAN MOTORISTS INSURANCE COMPANY'S PRIVILEGED AND NON-PRIVILEGED DOCUMENTS AND TESTIMONY RELATING TO THE "NAMED INSURED" ISSUE UNDER THE FRAUD EXCEPTION TO THE ATTORNEY PRIVILEGE under submission on November 4, 1998, now rules as follows:

Montrose's Motion to compel production of AMICIO'S named insured documents, privileged and non-privileged related documents and testimony is granted under the fraud exception to the attorney-client privilege. All such documents are to be submitted to the Court to be examined in camera. These documents are set out as items I through 6 on pages 49 and 50 of plaintiff's motion.

Montrose has established a prima facie showing that AMICO knew that Montrose was a named insured and has further shown that AMICO committed fraud in contending otherwise.

The *prima facie* showing is based on the following offered evidence by Montrose.

1. AMICO agreed to duplicate coverage provided by prior insurance carriers.

2. Prior insurers covered Montrose as a Stauffer related company under its general liability insurance this being conceded by AMICO.

3. AMICO policies defined "named insured" as Stauffer Chemical Company at all locations of the insured. This included owned or controlled subsidiaries or affliate companies or corporations now exisiting or hereinafter created.

4. AMICO covered Montrose's automobiles under the Stauffer coverage.

5. AMICO inspected Montrose facilities under Stauffer's policies.

6. Mr. John Noe of AMICO concluded after his review that Montrose was covered under the AMICO policies named insured provision under the Stauffer policies.

7. AMICO'S own documents refer to Montrose Chemical as a named insured.

8. AMICO'S premium calculations used Montrose loss, payroll, sales and automobile data in determining Stauffers premiums.

9. Montrose was not a "specific joint venture" excluded under the policies.

10. AMICO established substantial reserves on the Montrose claims.

11. AMICO provided documents to Montrose through its counsel that contradicted evidence in its files.

12. AMICO failed to disclose favorable coverage information to its insured.

13. A substantial number of documents have been identified during depositions and other forms of discovery but have not been provided by AMICO.

The ultimate determination of the above evidence offered by Montrose will be for the jury to decide. However, for purposes of discovery motions the Court can conclude that there are strong reasonable inferences of the above as being factual so as to constitute waiver of the attorney-client privilege.

A true copy of this minute order is sent to counsel via U.S. Mail this date as follows:

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Attorneys for Plaintiff
Montrose Chemical Corporation of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, a corporation, Plaintiff, v. AMERICAN MOTORISTS INSURANCE COMPANY, et al., Defendants. AND RELATED CROSS-ACTION.	: CASE NO. BC 130486 : ORDER GRANTING MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S MOTION TO COMPEL PRODUCTION OF AMERICAN MOTORISTS INSURANCE COMPANY'S PRIVILEGED AND NON-PRIVILEGED DOCUMENTS AND TESTIMONY UNDER FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE : DATE: NOVEMBER 4, 1998 : TIME: 8:15 A.M. : DEPT: 55 : JUDGE: HON. JOSEPH R. KALIN TRIAL DATE: MARCH 16, 1998 MOTION CUT-OFF: NONE DISCOVERY CUT-OFF: DEC. 15, 1998

Montrose Chemical Corporation of California's Motion to Compel Production of American Motorists Insurance Company's Privileged and Non-Privileged Documents under the Fraud Exception to the Attorney-Client Privilege, and matters related thereto, came on for hearing on October 27 and 28, 1998 and November 3 and 4, 1998. Montrose was represented by Kristine L. Wilkes of Latham & Watkins. American Motorists Insurance Company was represented by John C. Chesney of Drinker Biddle & Reath. This motion was initially noticed for hearing on September 1, 1998, and was twice continued to allow for thorough briefing and consideration. The Court has reviewed over two-hundred pages of briefing and over five-hundred exhibits. Based upon the briefing, exhibits and argument of counsel, the Court GRANTS Montrose's motion as set forth herein.

The Court having taken MONTROSE'S MOTION TO COMPEL PRODUCTION OF AMERICAN MOTORISTS INSURANCE COMPANY'S PRIVILEGED AND NON-PRIVILEGED DOCUMENTS AND TESTIMONY RELATING TO THE "NAMED INSURED" ISSUE UNDER THE FRAUD EXCEPTION TO THE ATTORNEY PRIVILEGE under submission on November 4, 1998, now rules as follows:

Montrose's Motion to compel production of AMICO's named insured documents' privileged and non-privileged related documents and testimony is granted under the fraud exception to the attorney-client privilege. All such documents are to be submitted to the Court to be examined *in camera*. These documents are set out as item 1 through 6 on pages 49 and 50 of plainmtiff's motion, and are as follows:

1. Communications between any AMICO agents, representatives or employees, including inside or outside counsel, relating to the "named insured" issue;[1]

---

1. "AMICO" includes Kemper, Lumbermens and any affiliated companies such as NATLSCO, as well as all inside and outside counsel, to extent AMICO has access to such donuments. Within forty days of entry of this Order, AMICO is to identify and documents within the scope of this Order which it is withholding on grounds that such document(s) is not within AMICO's custody or control.

2. Investigation documents, notes, reports or analyses relating to the "named insured" issue, including all Noe reports (unredacted) for all Stauffer claims and all documents reviewed by Mr. Noe in preparing his reports;

3. All underwriting documents relating to the "named insured" issue, including documents collected by the Environmental Claims Unit and notes taken by AMICO personnel regarding interviews with underwriters of the Stauffer account;

4. Claims file and payment records for all Stauffer and Montrose settled claims, including *Parker v. Stauffer,* the prior Henderson claim referenced in the Noe report.

5. Legible and complete copies of all AMICO loss runs, audit records and reports on the Stauffer policies, including but not limited to (a) records of any claims (property, automobile, liability, crime correspondence, business interruption or workers' compensation) paid by AMICO for Montrose claims (Henderson or Torrance); (2) records of any claims paid by AMICO for any of Stauffer's other 50% owned joint ventures, subsidiaries or affiliated companies; (3) any schedule or records relating to the location or key codes assigned to insured locations of Statffer operations; and (4) any list of Stauffer locations in AMICO's possession;

6. All communications between and among AMICO (including inside and outside counsel) and representatives of Montrose's other primary insurers relating to the "named insured" issue, including communications relating to the carriers' allegation that Montrose is a "sham" corporation or an alter ego of Stauffer or its successors.

Montrose has established a *prima facie* showing that AMICO knew that Montrose was a named insured and has further shown that AMICO committed fraud in contending otherwise.

The *prima facie* showing is based on the following offered evidence by Montrose.

1. AMICO agreed to duplicate coverage provided by prior insurance carriers.

2. Prior insurers covered Montrose as a Stauffer related company under its general liability insurance this being conceded by AMICO.

3. AMICO policies defined "named insured" as Stauffer Chemical Company at all locations of the insured. This included owned or controlled subsidiaries or affiliate companies or corporations now existing or hereinafter created.

4. AMICO covered Montrose's automobiles under the Stauffer coverage.

5. AMICO inspected Montrose facilities under Stauffer's policies.

6. Mr. John Noe of AMICO concluded after his review that Montrose was covered under the AMICO policies' named insured provision under the Stauffer policies.

7. AMICO's own documents refer to Montrose Chemical as a named insured.

8. AMICO's premium calculations used Montrose loss, payroll, sales and automobile data in determining Stauffer's premiums.

9. Montrose was not a "specific joint venture" excluded under the policies.

10. AMICO established substantial reserves on the Montrose claims.

11. AMICO provided documents to Montrose through its counsel that contradicted evidence in its files.

12. AMICO failed to disclose favorable coverage information to its insured.

13. A substantial number of documents have been identified during depositions and other forms of discovery but have not been provided by AMICO.

The ultimate determination of the above evidence offered by Montrose will be for the jury to decide. However, for purposes of discovery motions the Court can conclude that there are strong reasonable inferences of the above as being factual so as to constitute waiver of the attorney-client privilege.

IT IS THEREFORE ORDERED:

1. Unless this Order is stayed by appeal as provided herein, within forty days of entry of this Order, AMICO shall

produce to the Court for *in camera* inspection all documents in its possession (regardless of the office, department or branch where it is maintained, *e.g.*, Special Risk Underwriting, National Account Claim, Risk Experience, audit, accounting, NATLSCO, Environmental Claims Unit Central Claims Office, or Home Office) (including those in its counsel's possession) in any way relating to the "named insured" issue, including those documents in the categories listed in No. 1 through No. 6 at pages 1-2 above.

2. At the time of the *in camera* submission, AMICO shall simultaneously produce to Montrose a log of all documents submitted for *in camera* review, listing the documents by type, date, author, recipient, copied parties, and specific subject matter.

3. To the extent that AMICO does not assert a privilege as to documents within the scope of this Order, they shall be produced directly to Montrose within forty days of entry of this Order.

4. This Order will be stayed if AMICO petitions for appellate review within forty days of entry of this Order. Such stay shall remain in effect until AMICO exhausts appellate writ review. At that point, the time limits in this Order shall become effective, commencing to run from the date of the final Order.

DATED: December 11, 1998 JOSEPH R. KALIN, JUDGE

The Honorable Joseph R. Kalin
Los Angeles County Superior Court

Presented by:

LATHAM & WATKINS

By: Kristine L. Wilkes

Kristine L. Wilkes
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Attorneys for Plaintiff
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

MONTROSE CHEMICAL CORPORATON OF CALIFORNIA,	CASE NO. BC 130486
	CENTRAL CIVIL, WEST
	ORDER DENYING
Plaintiff,	AMERICAN MOTORISTS
	INSURANCE COMPANY'S
v.	MOTION TO STAY
	ENFORCEMENT OF THE
AMERICAN MOTORISTS INSURANCE COMPANY, et al.,	COURT'S DECEMBER 11, 1998
	ORDER GRANTING
	MONTROSE CHEMICAL
	CORPORATION OF
Defendant.	CALIFORNIA'S MOTION TO
	COMPEL UNDER FRAUD
	EXCEPTION TO
	ATTORNEY-CLIENT
	PRIVILEGE
AND RELATED CROSS ACTION.	
	ACTION FILED: JUNE 27, 1995
	DISCOVERY CUT-OFF: DECEMBER 15, 1998
	MOTION CUT-OFF: NONE
	TRIAL DATE: MARCH 16, 1999

The motion of American Motorist Insurance Company to Stay Exforcement of the Court's December 11, 1998 Order Granting Montrose Chemical Corporation of California Motion to Compel Under Fraud Exception to Attorney-Client Privilege came on for hearing on January 13, 1999 in Department 316 of the above-entitled court. Montrose was represented by Kristine L. Wilkes and Desiree I. Kellogg, of Latham & Watkins. AMICO was represented by Henry C. Truszkowski of Hewitt & Prout After consideration of the

submitted papers, the declarations and exhibits of the parties, the oral arguments of counsel, and good cause shown:

IT IS HEREBY ORDERED that AMICO's motion is DENIED in full.

DATED: January 15, 1999

/s/ JOSEPH R. KALIN, JUDGE

The Honorable Joseph Kalin
Los Angeles County Superior Court

Presented by

LATHAM & WATKINS

By: /s/ Kristine L. Wilkes

Kristine L. Wilkes
Attorneys for Plaintiff
Montrose Chemical Corporation of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 55 HON. JOSEPH R. KALIN, JUDGE

MONTROSE CHEMICAL CORPORATION, *Plaintiff,*	
vs.	No. BC 130486
AMERICAN MOTORISTS INSURANCE COMPANY, et al., *Defendants.*	
MONTROSE CHEMICAL CORPORATION, *Plaintiff,*	
vs.	No. BC 077158
TRAVELERS INSURANCE COMPANY, et al., *Defendant.*	

TRANSCRIPT OF PROCEEDINGS

November 24, 1998
See Appearances on Following Page)
(Videotape Recording)

Court Transcriber For Videotape Recording System: ELEANOR R. HALL TRANSCRIBING
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Bakersfield, California 93304
Telephone: (805) 322-8337

your Honor is not in the court.

MS. WILKES: Maybe the answer, your Honor, is for the parties to meet and confer and try to put something in the order we agree on and if not, then —

THE COURT: Come in ex parte and we'll make an order on it.

MS. WILKES: All right. Thank you, your Honor.

THE COURT: Thank you.

MS. KENNEDY: And just another clarification is and you, your Honor, are planning on reviewing these?

THE COURT: In camera, yes.

MS. KENNEDY: In camera. I know that you're —

THE COURT: Because I am concerned about, you know, if one attorney says to the other attorney, not on specific documents or something, we're going to do this or do that type of a situation.

MS. KENNEDY: And that's why I said you do — you are still granting us a privilege on trial strategy, your, Honor?

THE COURT: Oh, yes. Yes. Trial strategy. I'm saying trial strategy is as long as it's not in terms of — you know, obviously what Montrose is looking for here is certain types of documents and trial strategy is not — they're not entitled to.

MS. KENNEDY: Right. And then — I'm just clarifying that you, as opposed to Judge Rudolf —

THE COURT: Yes, I —

MS. KENNEDY: — are reviewing these because some of these documents may also fall into the proposed order that has been submitted asking certain documents be submitted to Judge Rudolf, so another thing we may have to deal with is how those proposed orders interact.

THE COURT: Well, this order is independent of itself. If there are some things that Judge Rudolf was looking at, I'm going to be looking at it now. I don't want to turn this over to Judge Rudolf or anybody else at this point in time because we're getting too close to the trial date and it's a jury trial and the jury is going to decide all of the factual issues.

MS. KENNEDY: And just — as another matter of clarifying so when we work out this proposed order with them I have all the information, to the extent that materials have

been previously produced to your Honor in camera, is there any reason to reproduce them?

THE COURT: Yes, because I don't — I've looked at them before and I ruled on them in a different light. Now they become — they may or may not be relevant to this order at this point. Okay?

(Attorneys thank the court; the proceedings were concluded for this date)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 55 HON. JOSEPH R. KALIN, JUDGE

MONTROSE CHEMICAL CORPORATION, *Plaintiff,*	:	
vs.	:	No. BC 130486
AMERICAN MOTORISTS INSURANCE COMPANY, et al., *Defendants.*	:	

TRANSCRIPT OF PROCEEDINGS
December 15, 1998

APPEARANCES:

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Court Transcriber
For Videotape
Recording System:

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MR. MacPHERSON: Your Honor, that's unworkable. Your Honor, we need a definitive ruling now. I can't call up the client and say "We need to prepare for trial and I just need you to know that there's an order currently outstanding saying that whatever we say is producible to the court. Now, we can go in and assert that that order shouldn't be enforced but I can't talk to you with the confidence that the attorney-client privilege provides." Your Honor, that's an unworkable solution.

MR. TAYLOR: One observation, your Honor.

THE COURT: Yes.

MR. TAYLOR: Aside from AMICO's trial prep in this case, the fraud and the named insured issue is continuing in Canadian II and Canadian III where they're appealing your Honor's order ordering them to defend those cases and appealing your Honor's named insured order in those cases. So aside from the trial prep we have, I think —

THE COURT: Yes. See, that's another issue now. I mean, if — that's the continuing bad faith that Montrose is alleging, that years ago you should have followed the court orders, whatever they were at that time and the duty to defend it, so any appeals on those issues right now would be something that would be producible but not necessarily the attorney — what the attorneys — we've got whole new issues arising here.

MR. MacPHERSON: Your Honor, the order should be limited to the date the motion was filed, your Honor. Our client has a right to appeal to the advice of counsel and the appeals. Your Honor, I vociferously disagree with you that your Honor's order should encompass the advice of counsel given in the appeals in Canadian II and Canadian III.

MS. GREGORSKI: I think there's a distinction we need to draw, your Honor, between maybe trial preparation and the bad faith case —

THE COURT: Yes.

MS. GREGORSKI: — which your Honor is indicating is protected and is not something that something be submitted in camera; versus the ongoing fraud — or the ongoing fraud in the Canadian I, Canadian II or Canadian III matters, which is Montrose alleging continuing and which is Montrose as asserted in the papers which your Honor has granted continuing. So there's a distinction there. So if we put a time limit on it and say I'd put the date that Montrose filed the motion, we're eliminating — we're eliminating not only the bad faith but the trial preparation, perhaps those materials, but we're also eliminating perhaps documents that were submitted or attorney-client communications a week after in the Canadian II or Canadian III underlying also the fraud.

MR. MacPHERSON: Your Honor, AMICO has — I'm sorry, were you finished?

MS. GREGORSKI: Sorry. But again, your Honor, I think the point to focus on is that the order has been signed and should go forward and the appeals process should run and presumably AMICO is not going to be — is going to, you know, appeal the decision in 40 days and we'll have to go through the Court of Appeals and at the time they're presenting documents to your Honor, if there are outstanding issues that — you know, trial preparation we could address those at that time.

THE COURT: I don't intend to have discovery of trial preparation but I would agree that if Montrose is alleging ongoing bad faith that — I'm not cutting that issue off under any circumstances, counsel. So I'm going to leave the order the way it is.

MS. GREGORSKI: Thank you, your Honor.

MR. MacPHERSON: Your Honor, we have some additional substantive problems with the order. For example —

MS. GREGORSKI: I believe your Honor has already reviewed any objections that were filed.

MR. MacPHERSON: Well, your Honor hadn't reviewed our counter-proposed order which tracks precisely your rulings, your Honor and —

MS. GREGORSKI: Oh, that track —

MR. MacPHERSON: — and your minute order, but, your Honor, for example, Montrose's order is so overbroad and so far extends beyond what your Honor ruled. For example it's not limited to attorney-client communications which you expressly ruled was the only thing subject to the attorney-client fraud, but it orders, for example, the production of all communications among counsel, when a client's not present, does it refer to a client?

Your Honor, that once again is unworkable. I mean, if I want to talk to a colleague at the office about the named insured issue, do I need to conference call your Honor in so you can participate in camera in this communication between counsel?

This order is unworkable in so many ways.

THE COURT: Counsel, if you have a communication, an oral communication with another counsel, how is the court in any way going to get to that? I'm talking about documents; I'm talking about things that go back and forth, that type of situation.

MR. MacPHERSON: So this order is limited to documents, for example? They cannot now depose AMICO's counsel about communications among all counsel which they had?

MS. GREGORSKI: Again, your Honor, the order specifically laid all this out and what AMICO is trying to do is come in here and try to usurp with Ms. Wilkes in absence —

THE COURT: Yes.

MS. GREGORSKI: — and try to usurp specific parts of the order that, you know, were briefed or argued during the motion.

THE COURT: Counsel, again we're dealing with a situation. If there's going to be a deposition of a counsel, that will have to be dealt with at that time because you're indicating counsel are talking about something in an informal matter in the office as opposed to what if you had a meeting between counsel and there was definite strategy planned but it wasn't reduced to writing.

MR. MacPHERSON: Your Honor, their order — we're not in here because we're trying to make problems, your Honor. We're in here because their order is so broad and so

vague that these are the type of arguments that they can propound in the future, your Honor, and we need a definitive order that establishes the parameters of the attorney-client relationship; what privileged communications we can have with our client; what privileged communications counsel can have among themselves. Your Honor, and it's not addressed in their order, and that's the reason that we're in here seeking clarification of the order.

THE COURT: Well, the order was intended to be broad so I think you're going to have to – if you refuse to turn something over or refuse to have a deposition then it's going to have to be dealt with on a motion to compel.

MS. GREGORSKI: A motion for protective order, a motion to quash.

MR. MacPHERSON: So your Honor is stating that we have no assurances that any type of privileges can apply going forward to a communications among counsel. Is that the statement of your Honor?

THE COURT: Counsel, you've got two different issues. You've got an issue of trial preparation and you've got an issue of bad faith, so you still have, as far as trial preparation it's going to be privileged. As far as making decisions with regard to where AMICO is going to go on the duty to defend that still goes to the bad faith as an ongoing type of a situation.

MR. MacPHERSON: Your Honor, AMICO is defending Montrose in all these actions. That's really not an issue anymore.

THE COURT: But it's being appealed. Isn't that what counsel just said?

MR. MacPHERSON: We have taken appeals in Canadian II and III.

MS. GREGORSKI: Yes.

THE COURT: So isn't the continuation of the appeal a possible issue of bad faith?

MR. MacPHERSON: Your Honor, AMICO has the right to assert its – its legal arguments while it's paying Montrose's defense costs under a full reservation of rights, your Honor.

There's nothing improper about that and there's nothing in bad faith about that. There's nothing in that to vitiate the attorney-client privilege.

MR. TAYLOR: Your Honor, taking unreasonable litigation positions and causing unreasonable litigation is bad faith and they have a right to an appeal, and they have a right to make what arguments they want but they do so at their own peril. So that's part of what a carrier has to do is make the decision whether to take unreasonable litigation positions at the risk of bad faith or not.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
Date 10/28/97 **DEPT.55**

HONORABLE	**Joseph R. Kalin** JUDGE	**E T ESPINOZA**	DEPUTY CLERK	
HONORABLE	JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR		
BC005158	**A ALBA, CSL**	Deputy Sheriff	**NONE**	Reporter
		Plaintiff Counsel		
MONTROSE CHEMICAL CORP OF CALIF VS CANADIAN UNIVERSAL INSUR CO INC ET AL		Defendant Counsel	**NO APPEARANCES**	

***r/t* BC046677, BC077158, BC13048**
C594148 & C/W C597389

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court having taken Motion of Plaintiff and Cross-Defendant Montrose Chemical Corporation of California for Summary Adjudication against American Motorists Insurance Company under submission on October 22, 1997, now rules as follows:

Combined Motion in cases BC005158 (Canadian II) and BC077158 (Canadian III) is GRANTED establishing as a matter of law that Montrose Chemical Corporation is a named insured under American Motorist Insurance Company policies 9ZM555300, OZM555300 and IZM555300 for the period of January 1969 through March 1, 1971.

Plaintiff, Montrose has met its burden of proof which has not been controverted by material issues of fact by defendant AMICO. Defendant AMICO has raised some disputed issues of fact, however, those issues of fact are not material and are irrelevant.

Based upon the extensive material presented to the Court which stood in excess of three feet high and consisting of declarations, depositions, deposition testimony, prior court proceedings and prior appellate and trial court proceedings from various courts, this court finds that there is no ambiguity in the policy language, observing reasonable interpretation of the policy, considering admissions by defendant's personnel, the plain meaning of the insured definition and the overwhelming extrinsic evidence defendant has failed to raise any material issue of fact for jury consideration.

The Court finds Montrose as a named insured as a matter of law.

Defendant AMICO has raised the issue that the Court cannot consider Montrose's Motion for Summary Adjudication as being prohibited by Section 1008 Code of Civil Procedure.

Case BC005158 (Canadian II) heard by the California Supreme Court establish AMICO's Duty to Defend Montrose regarding the underlying toxic contamination tort cases. However, the Supreme Court did not rule on the issue of "named insured" thus returning that issue to the trial court.

In case BC077158 (Canadian III) the Court of Appeals reversed the trial court on the issue of "named insured" on the basis the trial court did not have before it the necessary evidence to decide the issue and based upon the trial court accepting the Montrose's theory of collateral estoppal. The matter was remanded to the trial court on the issue of "named insured".

This court's interpretation of the Appellate and Supreme Court decisions is that the trial court should upon remand reconsider the "named insured" issue upon being presented with all the necessary material with which to make such a decision. By way of the present Summary Adjudication Motion before it, this court is now able to reach such a decision.

The interests of justice and judicial economy support consideration of these motions. These cases now encompass over 70 Court volumes accumulated over several years as a result of innumerable hearings. A recent discovery motion in one of the related Montrose cases being handled by this court addressed documents for productions which if stacked on top of each other would reach the height of a 17 story office building.

Aspects of these cases have on more than one occasion been before the Appellate and Supreme Court of this State. By ruling on these motions the "named insured" issue can be resolved (subject to the appellate process which has been indicated by the parties) and the court can move on to resolve

other issues in these cases and set a realistic trial date for final resolution of these lenghty, complicated cases.

A true copy of this minute order is sent to counsel via U.S. Mail this date as follows:

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AMERICAN MOTORISTS INSURANCE COMPANY, *Petitioner,*	:	B100029 (Super. Ct. No. BC077158)
v.	:	(Joseph R. Kalin, Judge)
THE SUPERIOR COURT, *Respondent.*	:	
MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, *Real Party in Interest.*	:	

ORIGINAL PROCEEDING; petition for writ of mandate. Writ granted with directions.

Hewitt & Prout, Erica S. Arouesty, Daniel A. Rozansky, Stephen L. Hewitt; Drinker, Biddle & Reath, John Chesney, Michael F. Brown, and Jeanine M. Kasulis for Petitioner.

No appearance for Respondent.

Latham & Watkins, David L. Mulliken, Barry J. Shotts, Whitney E. Peterson and William C. Tayler for Real Party in Interest.

American Motorists Insurance Company ("AMICO") seeks extraordinary writ review of an order which summarily adjudicated the issue of AMICO's duty to defend Montrose Chemical Corporation of California in one of three underlying

tort actions. In the order, the superior court determined that Montrose was a named insured under several AMICO policies that had been issued to Stauffer Chemical Company, a 50 percent owner of Montrose during the relevant periods. In the same order, the court also denied AMICO's motion for summary adjudication on the issue of whether the damages allegedly sustained by the plaintiffs in the underlying action had occurred outside its policy periods. The court directed AMICO to pay Montrose's defense costs in the underlying Alderman action (Raymond Alderman, et al. v. Cadillac/Fairview California, Inc., et al. (Super. Ct. L.A. County, BC 069093)), and AMICO petitioned for review. We issued an alternative writ and set the matter for oral argument.

This proceeding resurrects issues that originated in a prior appeal between the parties decided by this Division in 1993. (*Montrose Chemical Corp. v. American Motorists Ins. Co.* (Jan. 25, 1993, B058060) (hereinafter, *"Canadian Universal I"*).)[1] Montrose contends we should dismiss the instant petition because AMICO possesses an adequate remedy by appeal, as discussed in *Canadian Universal I.* Montrose defends the trial court's findings that our prior decision in *Canadian Universal I* has collaterally estopped AMICO from relitigating the named insured defense against Montrose in this action, and that Montrose is a named insured as a matter of law. AMICO challenges those findings as well as the denial of its summary adjudication motion on whether the damages sustained by the Alderman plaintiffs had occurred outside its policy periods.[2]

MONTROSE'S MOTION

The portion of the order under review that partially granted Montrose's alternative motion for summary adjudica-

1. The California Supreme Court initially granted review on April 29, 1993, (S031548), but dismissed and remanded the matter to this Court on February 10, 1994 (S031548). We then issued our remittitur.

2. With its return to the alternative writ, Montrose filed 42 bound volumes of exhibits, many of which concerned *Canadian Universal I.* AMICO moved to strike 27 volumes of Montrose's exhibits. We deny the motion to strike.

tion of issues left undecided whether AMICO owes a duty to defend Montrose in two other underlying actions. Following the well-established rule that summary adjudication orders are not appealable if they leave other issues between the parties undecided, we reject Montrose's assertion that the order is appealable. (*Field Research Corp. v. Superior Court* (1969) 71 Cal.2d 110, 111.)

Although we entertained AMICO's prior appeal in *Canadian Universal I* from an order directing the payment of defense costs when coverage issues remained to be adjudicated, that does not mean the instant order is appealable or that our prior decision has collaterally estopped AMICO from relitigating the named insured defense against Montrose. *Canadian Universal I* arose in a different procedural posture and the issue of the named insured defense was not before us.

In *Canadian Universal I*, Montrose alleged that AMICO was required to defend *and* indemnify Montrose in the Stringfellow[3] and Levin Metals[4] cases. (Montrose does not allege in the present complaint that AMICO must indemnify Montrose in the three underlying cases.) Judge Wisot, the trial judge in *Canadian Universal I,* found by means of summary adjudication of issues, that Montrose was AMICO's named insured under the same policies at issue herein, and that AMICO owed Montrose a defense in the Stringfellow and Levin Metals cases. With regard to establishing the existence of an immediate duty to defend in *Canadian Universal I,* nothing further remained to be litigated. Only the coverage issues were undecided when AMICO unilaterally refused to pay Montrose's defense costs in the Levin Metals cases, contrary to the spirit of Judge Wisot's summary adjudication orders.

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3. *United States of America, et al. v. J. B. Stringfellow, Jr., et al.* (Civ. No. 83-2501 (HLH) C.D. Cal., and Newman, et al. v. J. B. Stringfellow, Jr., et al. (Super. Ct. Riverside County, No. 165994MF).

4. *Parr-Richmond Terminal Co., et al. v. Levin Metals Corp., et al.* (No. C 85-4776 SC, N.D. Cal.), *Levin Metals Corp., et al. v. Parr-Richmond Terminal Co., et al.* (Nos. C 84-6273 SC and 84-6324 SC, N.D. Cal.) and Levin Metals Corp. v. Parr-Richmond Terminal Co. et al. (Super. Ct. Contra Costa County, No. 255836).

When Judge Wisot entered an equitable order of enforcement requiring the immediate payment of Montrose's defense costs, AMICO appealed from that order, but in an incongruous manner. On the one hand, AMICO asserted that Judge Wisot's order was not a final judgment because coverage issues remained to be litigated. On the other hand, AMICO did not petition for extraordinary writ relief on the ground that there was no final judgment, as it did in this case.

Relying on the collateral order exception to the one final judgment rule, we severed the order to pay from the independent and remaining coverage issues in *Canadian Universal I.* By affirming the order to pay without reviewing Judge Wisot's summary adjudication ruling that Montrose was a named insured, an issue neither raised by AMICO in its appellate briefs nor mentioned in our opinion in *Canadian Universal I,* we did not review the merits of the named insured finding. Our opinion in *Canadian Universal I,* which enforced an immediate duty to defend order, was not a final judgment on the merits that barred AMICO from relitigating the named insured issue in this action.[5] *Canadian Universal I* resolved the questions of whether Judge Wisot possessed the equitable power to enforce the duty to defend orders, and whether the procedure he used was appropriate. With regard to AMICO we did not rule on anything else.

"The doctrines of res judicata and collateral estoppel apply only when a final judgment on the merits has been rendered. [Citations.] When, as here, ajudgment is still open to direct attack by appeal or otherwise, it is not final and the doctrines of res judicata, and collateral estoppel do not apply." (*National Union Fire Ins. Co. v. Stiles Professionol Low Corp.* (1991) 235 Cal.App.3d 1718, 1726.) In *Canadian Universal I,* at

5. Montrose, however, quoted the following sentence from our prior opinion in *Canadian Universal I* as evidence of collateral estoppel: "'We conclude, however, that the summary adjudication orders were not final for the purpose of appeal *until they were incorporated in the subsequent final order to pay defense costs.*' [Emphasis added.]" We did not intend by that sentence to preclude AMICO from relitigating the named insured issue against Montrose in other actions, prior to the entry of a final judgment on the coverage issues in *Canadian Universal I.*

most we implicitly assumed that Montrose was a named insured for the purposes of enforcing Judge Wisot's orders finding an immediate duty to defend. But an insurer may subsequently be relieved of such duty when it shows "that there is *no* potential for coverage[.]" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.)

In any event, the severance procedure we utilized in *Canadian Universal I* is no longer permissible due to a subsequent change in the law. In May 1994, the California Supreme Court decided *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725. *Morehart* disapproved several intermediate appellate opinions which, like *Canadian Universal I,* had held that the one final judgment rule did not bar an appeal from a judgment in a properly severed portion of a case. *Morehart* held that "an appeal cannot be taken from a judgment that fails to complete the disposition of all of the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Id.* at p. 743.) Our exercise of appellate jurisdiction in *Canadian Universal I* does not withstand scrutiny in light of *Morehort,* which we must follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450,455.)

The trial court's alternative finding that Montrose was a named insured as a matter of law is not supported by the record. The evidence Montrose presented below concerned its collateral estoppel theory and consisted of Judge Wisot's rulings and our prior opinion in *Canadian Universal I.* Montrose did not supply the court below with the exhibits that Judge Wisot had examined in rejecting the named insured defense in *Canadian Universal I.* In the absence of those exhibits or other evidence, the court below erred in deciding, as a matter of law, that Montrose was a named insured. (*Montrose Chemical Corp. v. Superior Court, supra,* 6 Cal.4th at p. 294, fn. 3.)

We conclude Montrose's motion for summary adjudication of AMICO's duty to defend was erroneously granted in the face of a triable issue of material fact regarding Montrose's status as a named insured.

DENIAL OF AMICO'S MOTION

AMICO joined in the motion of codefendant Insurance Company of North America to establish by summary adjudication that the damages sought by the Alderman plaintiffs were sustained long after the periods covered by their respective policies. The trial court denied their motion and AMICO seeks extraordinary writ review of that denial.

The complaint in Alderman alleged that hazardous chemicals had escaped from Montrose's Torrance facility during its operation from 1947 to 1982, and had migrated onto the plaintiffs' properties, injuring their health and property values. The Alderman plaintiffs allegedly discovered the migration of the hazardous chemicals within three years of the filing of their complaint.

AMICO reads these allegations to mean that the alleged damages occurred within three years of the filing of the complaint, which would have been well beyond the periods covered by the AMICO policies issued to Stauffer. We read the complaint, however, as alleging that environmental contamination occurred during Montrose's years of operation of its facility, not merely during the three years prior to the filing of the complaint. This allegation was sufficient to establish a potential for coverage under *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645.

We conclude AMICO's motion for summary adjudication was properly denied due to the existence of triable issues of material fact.

DISPOSITION

Let a peremptory writ issue, commanding respondent superior court to vacate the portions of its order of November 30, 1995, granting the motion for summary adjudication on Issue 3 against AMICO and ordering AMICO to pay Montrose's defense costs, in Los Angeles Superior Court case No. BC077158, entitled Montrose Chemical Corp. v. The Travelers Indemnity Co., et al., and enter a new and different order, denying same. In all other respects the petition for writ of mandate is denied. Each party is to bear its own costs.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

VOGEL (Miriam A.), J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, a corporation, *Plaintiff,* *v.* THE TRAVELERS INDEMNITY COMPANY, a corporation; CANADIAN UNIVERSAL INSURANCE COMPANY, INC., a corporation; AMERICAN MOTORISTS INSURANCE COMPANY, a corporation; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. a corporation; INSURANCE COMPANY OF NORTH AMERICA, a corporation: CENTAUR INSURANCE COMPANY, a corporation; ADMIRAL INSURANCE COMPANY, a corporation; AMERICAN CENTENNIAL INSURANCE COMPANY, a corporation; and DOES I through 500.inclusivc, *Defendants.* AND RELATED CROSS-ACTIONS.	Case No. BC077158 ORDER GRANTING PLAINTIFF MONTROSE CHEMICAL CORPORATION OF CALIFORNIA'S MOTION FOR SUMMARY ADJUDICATION AGAINST ALL PRIMARY CGL CARRIERS (ALDERMAN)

The motion of plaintiff and cross-defendant Montrose Chemical Corporation of California ("Montrose") for Summary Judgment, or, in the alternative, for Summary Adjudication ("Montrose's Motion") against defendants Insurance Company of North America, American Motorists Insurance Company, The Travelers Indemnity Company. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Canadian Universal Insurance Company, Inc. and Admiral Insurance Company (collectively, the "Carriers") came on regularly for hearing on May 18, 1994 in Department 55 of this Court, the Honorable Joseph Kalin, Judge, presiding.

After full consideration of the evidence and points and authorities submitted by all parties, and the oral argument of counsel, the Court hereby finds that Montrose has shown by admissible evidence and reasonable inferences therefrom not contradicted by other evidence or inferences, and by matters judicially noticed by this Court, that the Carriers have no defense to Montrose's first, second, third and fourth causes of action in Montrose's Second Amended Complaint, and there being no triable issue as to any material fact, the following issues are without substantial controversy:

Issue 1 (against defendant Admiral Insurance Company):

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint — except as to Admiral Insurance Company's 1985 Policy Number A85EG 2658 — because, as a matter of undisputed material fact and as a matter of law, defendant Admiral Insurance Company has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman. et at. v. Cadillac Fairview/California, Inc., et al.,* Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts. ¶¶ 1-2. 32-43).

Issue 2 (against defendant Insurance Company of North America):

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to

the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant Insurance Company of North America has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts, Facts ¶¶ 3-4, 32-43).

Issue 3 (against defendant American Motorists Insurance Company

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant American Motorists Insurance Company ("AMICO") has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts, ¶¶ 11-12, 32-43). In so doing, the court considered and rejected AMICO's argument that Montrose is not a named insured, instead ruling that AMICO is collaterally estopped from relitigating the named insured issue and, alternatively, that Montrose is a named insured under AMICO's policies as a matter of law.

Issue 4 (against defendant The Travelers Indemnity Company):

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant The Travelers Indemnity Company has a past, present and continuing duty to defend Montrose in *C. Raymond*

Alderman, et al. v. Cadillac Fairview/California, Inc., et al., Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts. ¶¶ 5-6, 32-43).

Issue 5 (against defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania:

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant National Union Fire Insurance Company of Pittsburgh. Pennsylvania has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts, ¶¶ 7-8, 32-43).

Issue 6 (against defendant Canadian Universal Insurance Company, Inc.):

Plaintiff Montrose Chemical Corporation of California is entitled to a summary adjudication in its favor as to the first, second, third and fourth causes of action in its Second Amended Complaint because, as a matter of undisputed material fact and as a matter of law, defendant Canadian Universal Insurance Company, Inc. has a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court). (*See* Plaintiff's Separate Statement of Undisputed Material Facts, ¶¶ 9-10, 32-43).

IT IS THEREFORE ORDERED that Montrose's first, second, third and fourth causes of action, and the Carriers' past, present and continuing duty to defend, shall be deemed established in favor of Montrose and against the Carriers pursuant to the foregoing issues, and that no further evidence or

proof thereof shall be required in this action, and that the final judgment herein shall be based upon the matters so established.

IT IS FURTHER ORDERED that Montrose is entitled to such further relief as a matter of undisputed fact (*see* Plaintiff's Separate Statement of Undisputed Material Facts, ¶¶ 1-12, 32-43), and as a matter of law, as follows:

1. The Carriers have a past, present and continuing duty to defend Montrose in *C. Raymond Alderman, et al. v. Cadillac Fairview/California, Inc., et al.*, Case No. BC062039 (Los Angeles County Superior Court) (the "*Alderman* Action").

2. Subject to paragraph 5 of this Order, each Carrier is and shall be separately and independently liable for the entire amount of Montrose's reasonable attorneys' fees and costs, and any potential disagreement among the Carriers or some of them regarding allocation of Montrose's defense costs shall not relieve the Carriers, or any of them, from the obligation to pay all of Montrose's defense costs when due. No allocation of defense costs shall be made to Montrose.

3. The Carriers, and each of them, are ordered to reimburse Montrose for all past reasonable attorneys' fees and costs (including interest accrued at the legal rate) incurred as of July 1994 by Montrose in defense of the *Alderman* Action. Montrose already has provided to the Court specific invoices and/or billing statements setting forth the reasonable attorneys' fees and costs incurred as of December 1993, and the Court already has determined such attorneys' fees and costs to be reasonable. In addition. Montrose already has provided to the Carriers by mail or otherwise specific invoices and/or billing statements setting forth the reasonable attorneys' fees and costs incurred as of July 1994. Within thirty days from the date of this Order, the Carriers, and each of them, shall provide payment to Montrose of the total amount set forth in these statements, including interest accrued at the legal rate, from the date of such statements.

4. Subject to paragraph 5 of this Order, the Carriers, and each of them, are ordered to specifically perform their duty to defend under their particular policies of insurance by paying Montrose for the full amount of all reasonable attorneys' fees

and costs incurred in the *Alderman* Action after July 1994. Montrose shall provide to the Carriers by mail (or otherwise) statements on a monthly basis setting forth the reasonable attorneys' fees and costs incurred by Montrose. Within thirty days of receipt of such statement, the Carriers, and each of them, shall provide payment to Montrose of the total amount set forth in the statements, subject to paragraph 5 of this Order. Interest shall accrued on any statement unpaid more than thirty days after the date of receipt by any Carrier at the rate of ten percent per annum until paid.

5. If any Carrier in good faith contends that part of a statement received after the date of this Order is not a reasonable defense cost, it must so notify counsel for Montrose within thirty days of receipt of the statement objected to. If Montrose and the objecting Carrier cannot resolve the dispute within the same thirty-day period, the objecting Carrier must file an objection with the Court within said period and the Carrier is relieved from paying the disputed portion of the statement until the Court or a referee has resolved the dispute. The existence of a dispute as to any particular item on a statement shall not relieve the Carriers from paying the undisputed amount of all other items on a statement within thirty days of receipt of the statement.

6. Nothing in this Order shall permit Montrose to receive or recover more than its actual attorneys' fees and costs. In the event Montrose receives or recovers duplicate payment for any particular attorneys' fees or costs, Montrose shall promptly notify all Carriers and shall remit the amount of the duplicate payment to the Carriers in proportion to their payments.

7. Nothing in this Order shall affect the rights of any Carrier to seek contribution or indemnity from any other Carrier.

IT IS FURTHER ORDERED that Admiral Insurance Company's ("Admiral") Cross-Motion for Summary Adjudication of Issues (Alderman) and Insurance Company of North America's ("INA") Motion For Summary Adjudication Of Issues [CCP 437c] are DENIED on the basis that the cross-motions did not present evidence that the *Alderman* Action cannot come within the policies' coverage by virtue of the

scope of the insuring clause or the breadth of an exclusion. *See* Plaintiff's Separate Statement of Disputed And Undisputed Material Facts In Opposition To Admiral's Cross-Motion For Summary Adjudication Of Issues (Alderman), ¶¶ 3-6; Plaintiff's Separate Statement of Disputed And Undisputed Material Facts In Opposition To Insurance Company of North America's Motion For Summary Adjudication Of Issues, ¶¶ 3, 7-11; Admiral's Separate Statement of Disputed And Undisputed Material Facts In Opposition To Montrose's Motion For Summary Judgment Or, In The Alternative, Summary Adjudication And In Support Of Admiral's Cross-Motion For Summary Adjudication Of Issues (Alderman); Separate Statement Of Undisputed Facts In Support Of Defendant INA's Motion For Summary Adjudication Of Issues.

IT IS SO ORDERED.

Dated November 30, 1995

Joseph Kalin

The Honorable Joseph Kalin
Judge, Los Angeles County
Superior Court

PREPARED BY:

Barry J. Shotts

Barry J. Shotts
of LATHAM & WATKINS
Attorneys for Plaintiff and Cross-Defendant
Montrose Chemical Corporation of California

FILED
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No. 99-159

IN THE

Supreme Court of the United States

AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioner,

v.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Table of Appendices	iii
Factual Background and Procedural History	1
Additional Reason for Denying the Writ	3
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Bd. of License Commissioners of Tiverton v. Pastore, 469 U.S. 238 (1985) 3

BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240 (1988) 4

Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403 (S.D. Cal. 1994) 4

Fusari v. Steinberg, 419 U.S. 379 (1975) 3

United States v. Zolin, 491 U.S. 554 (1989) 5

Statute:

Cal. Evid. Code § 956 1

Rule:

Supreme Court Rule 15.8 ..... 1, 3

Other Authorities:

5 Am. Jur. 2d, Appellate Review, § 387 (1995) ... 3

23 Moore's Federal Practice, ¶ 515.09 (Matthew Bender 3d ed.) 3

APPENDIX

Page

Appendix — Opinion Of The Court Of Appeal Of The State Of California, Second Appellate District, Division One Filed August 26, 1999 .. 1a

Pursuant to Supreme Court Rule 15.8, Respondent Montrose Chemical Corporation of California ("Montrose") respectfully submits this supplemental brief to bring to the Court's attention a matter occurring subsequent to the filing of Montrose's opposition to American Motorists Insurance Company's ("AMICO") petition for writ of certiorari, which directly bears on the pending case and further demonstrates that AMICO's petition should be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 20, 1999, AMICO filed its petition for writ of certiorari challenging two rulings by the trial court in this insurance "bad faith" action.

First, AMICO challenged the trial court's December 10, 1998 interlocutory discovery order finding *prima facie* evidence that AMICO fraudulently asserted that Montrose was not a "named insured," and thereby waived its attorney-client privilege under California's crime-fraud exception to the attorney-client privilege (*See* Cal. Evid. Code § 956).[1] As a result of the *prima facie* evidence of AMICO's fraud, the trial court required AMICO to submit *in camera* all attorney-client privileged documents relating to the "named insured" issue regardless of whether the documents were prepared in connection with the "bad faith" action or in connection with appeals in related coverage actions that were pending when AMICO filed its petition for writ of certiorari with this Court.

1. California Evidence Code Section 956 provides in relevant part that "[t]here is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

Second, AMICO challenged the trial court's January 13, 1999 order refusing to stay enforcement of the December 10 crime-fraud order pending resolution of the related appeals in the coverage actions.[2]

Although the trial court's rulings were based on a fact-specific application of California law, for which United States Supreme Court review is not available, AMICO attempted to manufacture Supreme Court jurisdiction by invoking the rhetoric of federal due process. AMICO asserted that the trial court's fraud order and refusal to stay enforcement deprived AMICO of its right to counsel and right of access to the courts by interfering with AMICO's simultaneous prosecution of the related appeals.

On August 18, 1999, Montrose filed its opposition to AMICO's petition for writ of certiorari, stating that this Court should deny AMICO's petition because, *inter alia*: (1) the Court lacks jurisdiction to review the trial court's rulings; and (2) the trial court properly found that AMICO waived its attorney-client privilege, and denied AMICO's renewed request to stay the case, in a manner that does not raise any constitutional questions.[3] AMICO did not file any reply to Montrose's opposition.

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2. The California Court of Appeal summarily denied AMICO's petition for writ of mandate challenging both the trial court's December 10, 1998 and January 13, 1999 rulings on February 19, 1999. *See* Appendix to the Petition for Certiorari at 2a ("Pet. App."). On April 21, 1999, the California Supreme Court summarily denied AMICO's petition for review. Pet. App. at 1a.

3. For a detailed discussion of the factual background of this case, the decisions below, and the reasons for denying AMICO's petition for writ of certiorari, the Court may refer to Montrose's opposition brief. In this supplemental brief, Montrose will only discuss the portions of the case that are relevant to events occurring subsequent to the filing of respondent's opposition.

Subsequent to the filing of Montrose's opposition, the appellate court in the related appeals rendered a decision that directly undermines the basis of AMICO's challenge of the trial court's rulings. As discussed below, this new development provides an additional and dispositive reason for denying AMICO's petition for writ of certiorari.

ADDITIONAL REASON FOR DENYING THE WRIT

It is incumbent upon Montrose to advise this Court of a new factor that will affect the Court's consideration of this case. *See, e.g., Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring) ("[C]ounsel have a continuing duty to inform the Court of any development which may affect the outcome" of a case); *Bd. of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (same).[4]

As discussed in AMICO's petition and Montrose's opposition, AMICO seeks to invoke this Court's jurisdiction by asserting that the trial court deprived AMICO of its right to counsel and right of access to the courts in the related appeals by requiring AMICO to submit all documents relating to its ongoing fraud for the trial court's *in camera* review.[5]

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4. *See also* Rule 15.8 ("Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing"); 5 Am. Jur. 2d, Appellate Review, § 387 (1995); 23 Moore's Federal Practice, ¶ 515.09 (Matthew Bender 3d ed.).

5. Since the crime-fraud exception to the attorney-client privilege applies if the privileged material reasonably relates to the

(Cont'd)

Although the trial court implemented safeguards to fully protect AMICO's legitimate interests in the pending appeals,[6] AMICO argued that the trial court deprived AMICO of its right to counsel and right of access to the courts by refusing to stay enforcement of the December 11 Order. For example, AMICO stated its challenge as follows:

> By refusing to stay the Order pending the appeals, the trial court seeks to eviscerate AMICO's access to counsel *before* final resolution of the very issue upon which AMICO's right to counsel depends. Moreover, by forcing AMICO to share all past and future communications with its adversary while the appeals are pending, AMICO is denied any confidential access to its counsel in connection with ongoing appeals that attack the very foundation of the trial court's ruling.

Petition at 9. AMICO's challenge of the trial court's ruling therefore rested on two bases: (1) the trial court purportedly

(Cont'd)

subject matter of the ongoing fraud (*BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1269-1271 (1988); *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1415 (S.D. Cal. 1994)), the trial court properly required AMICO to submit *in camera* all documents relating to its ongoing fraud in asserting the "named insured" defense, regardless of whether they were prepared in connection with the "bad faith" action or the appeals in the coverage actions.

6. The trial court did not require AMICO to disclose formerly privileged documents directly to Montrose. Rather, the trial court required AMICO to submit all documents relating to the "named insured" issue for *in camera* review so that the court could protect AMICO's work product and litigation files, and redact or withhold from production any documents that would prejudice AMICO's litigation of its appeals.

required AMICO to share confidential communications with Montrose without due process; and (2) while the appeals in the coverage actions were pending. Neither basis had any merit when AMICO filed its petition, and AMICO's challenge is now further undermined by the appellate court's ruling in the related appeals.

First, the trial court *never* required AMICO to share formerly privileged communications directly with Montrose. Instead, the trial court required AMICO to submit its documents *in camera*, a procedure which this Court has endorsed. *See United States v. Zolin*, 491 U.S. 554, 572 (1989) (noting that *in camera* review "is a [lesser] intrusion upon the confidentiality of the attorney-client relationship than is public disclosure") (citation omitted). As set forth in Montrose's opposition, AMICO also had due process of law by exercising its immediate and direct access to the appellate courts with the assistance of its counsel when it filed its petition for writ of mandate with the California Court of Appeal and petition for review with the California Supreme Court.

Second, the appeals are no longer pending. The appellate court has resolved the appeals adversely to AMICO without considering any additional evidence discovered in the "bad faith" action. The Court of Appeal declined to consider the evidence of AMICO's fraud in asserting its "named insured" defense discovered in the course of the "bad faith" action, and ruled as a matter of law that Montrose is a "named insured" based upon the plain language of the AMICO policies.[7] The Court of Appeal wrote:

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7. The AMICO policies refer to the three policies that AMICO wrote for Montrose's former 50% shareholder — the Stauffer Chemical Company — and that covered Stauffer's "owned or controlled subsidiaries or affiliated companies or corporations now existing or hereafter created."

> It is hardly surprising that, as a result of AMICO's refusal to provide a defense and its insistence that Montrose is not a "named insured," Montrose has sued AMICO for bad faith. (*Montrose Chemical Corp. v. American Motorists Insurance Company, et al.*, L.A. Super. Ct. Case No. BC130486.) [footnote omitted] On these consolidated appeals, *Montrose refers to stacks of documents obtained through discovery in the bad faith action* that, according to Montrose, support its position regarding the meaning of "named insured," *and Montrose has asked us to consider documents that were not in its possession at the time the "consolidated motions" were before the trial court*. AMICO, in turn, asks us to deny Montrose's request to consider additional evidence on appeal and claims, in any event, that the documents do no more than create triable issues of fact about the meaning of "named insured." As will appear, *we find the policy language to be plain on its face, and therefore deny the requests to take additional evidence on appeal.*

Montrose Chemical Corp. of California v. American Motorists Ins. Co., California Court of Appeal, Second Appellate District, Case No. B122750, consolidated with B122893 (August 26, 1999) at 17 ("*Montrose v. American Motorists*") (emphasis added).[8]

As the Court of Appeal stated, it was unnecessary to rely on any additional evidence discovered in the "bad faith"

8. The Court of Appeal's decision is unpublished and lodged concurrently with Montrose's supplemental brief.

action because the uncontroverted evidence in the coverage actions established that Montrose was an insured:

> *Simply put, the evidence that is admitted or uncontroverted establishes as a matter of law that Montrose is a named insured under the AMICO policies.* (§ 437c, subd. (f)(1); 3 Couch on Insurance (3d ed. 1995) § 40.6, p. 40-9.) The conclusory assertions to the contrary offered by AMICO in opposition to Montrose's "consolidated motion" are not supported by competent evidence (indeed, most are unsupported by any evidence at all), leaving no triable issues of material fact. *Other than a seemingly suicidal desire to provide more grist for Montrose's bad faith mill, we see no basis in law, logic or reason for AMICO's continuing refusal to concede defeat on this point.* [footnote omitted]

Montrose v. American Motorists, at 20 (emphasis added).

Thus, it is clear that AMICO was not deprived of its right to counsel or right of access to the courts as a result of the trial court's order requiring AMICO to submit *in camera* all documents relating to its ongoing fraud in asserting that Montrose was not a "named insured." AMICO has had its appeals heard and resolved without consideration of the documents at issue.

AMICO's challenge to the trial court's January 13, 1999 order, which refused to stay enforcement of the December 11 crime-fraud order, is also undermined by these recent events. AMICO's entire challenge to the January 13 Order

is based on the trial court's refusal to stay the crime-fraud order *pending the resolution* of the appeals in the coverage action.[9] AMICO stated that "[p]ending resolution of this ["named insured"] issue by the Court of Appeals [sic] . . . there has been no final determination that AMICO's asserted ["named insured"] defense is, in fact, invalid." Petition at 12.

There has now been a resolution of the appeals in the coverage actions, with the Court of Appeal rejecting AMICO's "named insured" defense as invalid and ruling that Montrose is a "named insured" as a matter of law based on the plain policy language. *See Montrose v. American Motorists*, at 18 ("In plain English, the policies define 'named insured' as Stauffer and its 'owned or controlled subsidiaries or affiliated companies or corporations now existing or hereafter created.' [footnote omitted] Since it is undisputed that Stauffer owned 50 percent of Montrose and that the companies were 'affiliated' with each other, *it must be immediately apparent to everyone except AMICO that, under any rational construction, Montrose is a named insured under the relevant policies*") (emphasis added).

Since the appeals were resolved adversely to AMICO without consideration of any additional documents discovered in the course of the "bad faith" action, AMICO's challenge to the trial court's refusal to stay enforcement of the crime-fraud order pending resolution of the appeals is now moot.

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9. *See* Petition at i (Question Presented: "Whether trial court orders that . . . (c) refuse any stay of the 'fraud' order *pending the resolution of such appeals*, deny the litigant due process of law and its rights to counsel and to access to the courts under the United States Constitution") (emphasis added).

Indeed, the Court of Appeal's decision confirms the correctness of the trial court's ruling. Based upon uncontroverted evidence, the Court of Appeal rejected AMICO's "named insured" defense in the coverage actions, terming the result "obvious." Although the question of whether AMICO committed fraud in asserting its "named insured" defense will ultimately be resolved by a jury, the Court of Appeal's conclusion that "it must be immediately apparent to everyone except AMICO that, under any rational construction, Montrose is a named insured under the relevant policies," supports the trial court's order finding *prima facie* evidence that AMICO knowingly asserted a meritless defense.

AMICO based its request for a stay of the trial court's crime-fraud order on the theory that the appellate court might conclude that there is a triable issue of fact regarding Montrose's status as a "named insured." Now that the appellate court has concluded otherwise — finding that Montrose is a "named insured" as a matter of law — there is no basis for AMICO's challenge of the trial court's ruling.[10] AMICO's petition for writ of certiorari should therefore be denied.

---

10. As set forth in Montrose's opposition, the trial court's ruling would not have been undermined even if the appellate court had found that there *was* a triable issue of fact regarding Montrose's status as a "named insured." *See* Opposition at 11-12.

CONCLUSION

For the reasons set forth above, in addition to those set forth in respondent's opposition, Montrose respectfully requests this Court to deny AMICO's petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE FILED AUGUST 26, 1999

(Omitted here but submitted separately as Lodging Appendix)

Supreme Court, U.S.
FILED
AUG 18 1999
OFFICE OF THE CLERK

No. 99-159

IN THE

Supreme Court of the United States

AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioner,

v.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a trial court's interlocutory discovery order pursuant to California's statutory crime-fraud exception to the attorney-client privilege was decided and enforced in a manner that deprives a litigant of its due process rights to counsel and access to the courts.

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding. Respondent Montrose Chemical Corporation of California has two fifty percent shareholders, Stauffer Management Company (which is not publicly traded) and Chris-Craft Industries, Inc. (which is publicly traded).

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xii
Statutes and Constitutional Provisions Involved	1
Statement of the Case	1
A. Introduction	1
B. Factual Background	3
C. Decisions Below	6
Reasons for Denying the Writ	9
I. This Court Lacks Jurisdiction To Review The Trial Court's Ruling	13
A. The Judgment Below Is Interlocutory And Not "Final" For Purposes Of Supreme Court Review	13
B. The Judgment Below Rests Solely Upon An Adequate And Independent State Ground	17

Contents

Page

II. The Trial Court Properly Found That AMICO Waived Its Attorney-Client Privilege, And Denied AMICO's Renewed Request To Stay The Case, In A Manner That Does Not Raise Any Constitutional Questions 21

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

Cases:

Ake v. Oklahoma, 470 U.S. 68 (1985) 20

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 19

Bateman v. Arizona, 429 U.S. 1302 (1976) 9

Boughton v. Cotter Corp., 10 F.3d 746 (10th Cir. 1993) 16

BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240 (1988) 6, 7, 12, 17, 23

California v. Stewart, 384 U.S. 436 (1966) 15

Clark v. United States, 289 U.S. 1 (1933) 25

Coleman v. Thompson, 501 U.S. 722 (1991) 18, 19

Collins v. Miller, 252 U.S. 364 (1920) 14

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 14, 16, 17

Cunningham v. Connecticut Mut. Life Ins., 845 F. Supp. 1403 (S.D. Cal. 1994) 6, 7

Cunningham v. Hamilton County, 119 S. Ct. 1915 (1999) 14

Cited Authorities

Page

Durley v. Mayo, 351 U.S. 277 (1956) 21

Flynt v. Ohio, 451 U.S. 619 (1981) 15, 16

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) ... 17

Fraidin v. Weitzman, 611 A.2d 1046 (1992) 27

Glade v. Superior Court, 76 Cal. App. 3d 738 (1978) 25

Grace v. Ins. Co. of North America, 944 P.2d 460 (Alaska 1997) 12

Harris v. Reed, 489 U.S. 255 (1989) 18

Illinois v. Gates, 462 U.S. 213 (1983) 20

In re Feldberg, 862 F.2d 622 (7th Cir. 1988) 12

In re Marriage of Decker, 606 N.E.2d 1094 (1992) 27

Jefferson v. City of Tarrant, Alabama, 118 S. Ct. 481 (1997) 13, 14, 17

Johns v. Town of Los Gatos, 834 F. Supp. 1230 (N.D. Cal. 1993) 24

Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (1982) 27

Cited Authorities

	Page
Levin v. C.O.M.B. Co., 469 N.W.2d 512 (1991) ...	27
Lynch v. New York, 293 U.S. 52 (1934)	21
Market Street R. Co. v. Railroad Comm'n of California, 324 U.S. 548 (1945)	13
Marriott Corp. v. American Academy of Psychotherapists, Inc., 277 S.E.2d 785 (1981)	27
Massachusetts v. Upton, 466 U.S. 727 (1984)	20
Michigan v. Long, 463 U.S. 1032 (1983)	18
Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981)	15
Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., et al., Case No. C 594148, consolidated with Case No. C 597389	2, 3, 4
Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., et al., Case No. BC 005158	2, 3, 4, 7, 8, 10
Montrose Chemical Corp. of California v. The Travelers Indemnity Co., et al., Case No. BC 077158	2, 3, 4, 7, 8, 10
Neblett v. Carpenter, 305 U.S. 297 (1938)	19

Cited Authorities

Page

Nix v. Whiteside, 475 U.S. 157 (1986) 24, 25

Nowell v. Superior Court, 223 Cal. App. 2d 652 (1963) 6

O'Dell v. Espinoza, 456 U.S. 430 (1982) 14

Ohio v. Robinette, 519 U.S. 33 (1996) 20

Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission, 479 U.S. 1312 (1986) 9

People v. Paasche, 525 N.W.2d 914 (1994) 27

Purcell v. District Attorney for the Suffolk Dist., 676 N.E.2d 436 (1997) 27

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 17

St. Paul Fire & Marine Ins. Co. v. T.M. Coss, 80 Cal. App. 3d 888 (1978) 17

State v. Charlesworth, 951 P.2d 153 (Ore. App. 1997) 24

State v. Fodor, 880 P.2d 662 (1994) 27

State ex rel. Nix v. Cleveland, 700 N.E.2d 12 (1998) 28

Cited Authorities

Page

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (1991) 27

Stembridge v. Georgia, 343 U.S. 541 (1952) 21

United States v. Aldridge, 484 F.2d 655 (7th Cir. 1973), *cert. denied*, 415 U.S. 921 (1974) 27

United States v. Zolin, 491 U.S. 554 (1989) ...25, 26, 27

Upjohn Co. v. United States, 449 U.S. 383 (1981) 25

Ylst v. Nunnemaker, 501 U.S. 797 (1991) 20

Statutes:

28 U.S.C. § 1257 13

28 U.S.C. § 1257(a) 13

28 U.S.C. § 2101(f) 8

Cal. Code of Civ. Proc. § 1008 .....3, 8, 22

Cal. Evid. Code § 956 ..... 1, 6, 17, 18, 21

Cal. Evid. Code § 981 24

Cal. Evid. Code § 997 24

Cal. Evid. Code § 1018 24

Cited Authorities

Page

United States Constitution:

Fifth Amendment 1

Fourteenth Amendment 1

Rules:

Alabama (Evid. Rule 502(d)(1)) 27

Alaska (Evid. Rule 503(d)(1)) 27

Arkansas (Evid. Rule 502(d)(1)) 27

Florida (Evid. Code § 90.502(4)(a)) 27

Hawaii (Evid. Rule 503(d)(1)) 27

Idaho (Evid. Rule 502(d)(1)) 27

Kansas (Evid. Rule § 60-426(b)(1)) 27

Louisiana (Evid. Code § 506(C)(1)(a)) 27

Maine (Evid. Rule 502(d)(1)) 27

Mississippi (Evid. Rule 502(d)(1)) 27

Nebraska (Evid. Rule § 27-503(4)(a)) 27

Nevada (Nev. Rev. Stat. § 49.115) 27

Page

New Hampshire (Evid. Rule 502(d)(1)) 27

New Jersey (Evid. Rule 26(2)(a)) 27

New Mexico (Evid. Rule 11-503(d)(1)) 27

North Dakota (Evid. Rule 502(d)(1)) 27, 28

Oklahoma (Evid. Code § 2502(D)(1)) 28

Oregon (Evid. Code § 40.225, Rule 503(4)(a)) 28

South Dakota (Codified Laws § 19-13-5) 28

Texas (Evid. Rule 503(d)(1)) 28

Utah (Evid. Rule 504(d)(1)) 28

Vermont (Evid. Rule 502(d)(1)) 28

Wisconsin (Evid. Stat. § 905.03(4)(a)) 28

TABLE OF APPENDICES

Page

Appendix — Transcript Of Proceedings Of The Superior Court Of The State Of California For The County Of Los Angeles Dated November 4, 1998 . . . . . 1a

Respondent Montrose Chemical Corporation of California ("Montrose") respectfully requests this Court to deny the petition for writ of certiorari in this case for the reasons set forth herein.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the application of the crime-fraud exception to the attorney-client privilege, codified in California as Evidence Code Section 956, which provides in relevant part that "[t]here is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." Petitioner American Motorists Insurance Company ("AMICO") also relies upon the Fifth Amendment and the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

AMICO's petition for a writ of certiorari is driven by a thinly veiled disagreement with the application and enforcement of California law. Based upon overwhelming evidence, on December 11, 1998, the trial court concluded that a *prima facie* showing of fraud sufficient to pierce the attorney-client privilege under California Evidence Code § 956 was established. *See* Appendix to the Petition for Certiorari at 6a-11a ("Pet. App."). To protect AMICO's legitimate interests, and to ensure that only documents reasonably related to AMICO's ongoing fraud are disclosed to Montrose, the trial court directed petitioner to submit the documents for the trial court's *in camera* review.

The trial court's discovery order was entered in an insurance "bad faith" action, which Montrose was forced to initiate as a result of AMICO's bad faith failure to defend Montrose in a number of environmental and toxic tort lawsuits.[1] In the course of the bad faith lawsuit, Montrose discovered that AMICO's misconduct was not limited to its bad faith failure to defend Montrose, but also extended to fraud (with the assistance of counsel) in asserting that Montrose was not an insured. This discovery of AMICO's fraud in asserting the "named insured" defense through the use of its legal counsel led to the filing of Montrose's fraud motion, and the trial court's discovery order which is the subject of AMICO's certiorari petition.

Well over a month after the trial court announced its ruling on the crime-fraud motion, AMICO asked the trial court to stay its order — which would bring the bad faith case to a standstill — pending final resolution of appeals AMICO filed disputing duty to defend orders entered in the underlying insurance coverage cases, *Canadian II* and *Canadian III*.[2] The trial court previously had denied an

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1. The bad faith action, entitled *Montrose Chemical Corp. of California v. American Motorists Ins. Co., et al.*, Los Angeles Superior Court Case No. BC 130486, was filed against AMICO and two other carriers. Montrose has settled its dispute with the other two defendants, The Travelers Indemnity Company and Insurance Company of North America, and has dismissed the action against them with prejudice. AMICO is the sole remaining defendant, and trial is set for November 8, 1999.

2. AMICO's failure to defend Montrose forced Montrose into a series of coverage lawsuits in Los Angeles County Superior Court: *Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., et al.*, Case No. C 594148, consolidated with Case

(Cont'd)

identical stay motion in 1996, and AMICO made no attempt to argue for reconsideration of that prior ruling in accordance with California Code of Civil Procedure Section 1008. Given this previous denial of a stay, and because a stay was even less appropriate now, on January 13, 1999, the trial court summarily denied AMICO's renewed stay motion so that AMICO could seek appellate review of that order along with the December 11 Order within the 40-day time period set forth in the December 11 Order. Pet. App. at 12a-13a.

AMICO's petition for writ of mandate, challenging the December 11, 1998 crime-fraud order and the January 13, 1999 order denying AMICO's renewed stay motion, was summarily denied without an opinion by the Court of Appeal on February 19, 1999. Pet. App. at 2a. On March 1, 1999, AMICO filed its petition for review of the California Court of Appeal's summary denial of its petition for writ of mandate with the California Supreme Court. On April 21, 1999, the California Supreme Court summarily denied AMICO's petition for review without a written opinion. Pet. App. at 1a. AMICO now seeks to invoke the jurisdiction of this Court to review an interlocutory decision that rests on a fact-specific application of the state law of California.

B. Factual Background

Commencing in the early 1980s, Montrose became a target of numerous third party liability claims resulting from Montrose's manufacture of DDT, a pesticide and anti-

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No. C 597389 ("*Canadian I*") (Ashmann, J.); *Montrose Chemical Corp. of California v. Canadian Universal Ins. Co., et al.*, Case No. BC 005158 ("*Canadian II*") (Kalin, J.); and *Montrose Chemical Corp. of California v. The Travelers Indemnity Co., et al.*, Case No. BC 077158 ("*Canadian III*") (Kalin, J.).

malarial agent. Faced with alleged liability, Montrose turned to AMICO and other carriers for a defense. In order to avoid its defense obligation, AMICO claimed that Montrose was not an insured entitled to coverage under the AMICO policies.[3] The courts in the three coverage cases — *Canadian I*, *Canadian II*, and *Canadian III* — have resoundingly rejected this argument, and have repeatedly granted Montrose's motion for summary adjudication finding that Montrose is a "named insured" under the AMICO policies as a matter of law.[4] AMICO's steadfast refusal to defend Montrose despite numerous trial, intermediate appellate and Supreme Court orders to defend led to the filing of the bad faith lawsuit against AMICO.

As discovery unfolded in the bad faith case, Montrose discovered evidence that AMICO knowingly asserted its

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3. The AMICO policies refer to the three policies that AMICO wrote for Montrose's former 50% shareholder — the Stauffer Chemical Company — and that covered Stauffer's "owned or controlled subsidiaries or affiliated companies or corporations now existing or hereinafter created. . . ."

4. After the trial court summarily adjudicated in *Canadian II* and *Canadian III* that Montrose is a "named insured" under the AMICO policies in October of 1997, AMICO filed a writ petition with the Court of Appeal seeking review of that decision. AMICO's writ petition on the "named insured" summary adjudication was denied, as was AMICO's petition for review to the California Supreme Court. Accordingly, in 1998, the trial court reinstated prior orders directing AMICO to defend Montrose in the underlying cases at issue in *Canadian II* and *Canadian III*. AMICO's current appeals are not from the "named insured" ruling, but from these subsequent orders in *Canadian II* and *Canadian III*, setting forth the procedure for AMICO to follow in defending the underlying environmental cases. It is in these pending appeals that AMICO claims the trial court has denied it the right to counsel and access to the courts.

"named insured" defense fraudulently, invoking the assistance of counsel to further its fraud. Accordingly, in October of 1998, Montrose filed its initial discovery motion to compel production of AMICO's privileged and non-privileged documents and testimony relating to the "named insured" issue under California's fraud exception to the attorney-client privilege, Evidence Code Section 956.

The briefing and hearing process that followed was exhaustive: AMICO filed an opposition and a surreply in response to Montrose's reply brief, and the trial court heard oral argument on three hearing days, October 28, November 3, and November 4, 1998.[5] At the conclusion of these hearings, the trial court retired to consider the matter further. The court announced its ruling orally on November 23, 1998, and issued a written minute order embodying that ruling on November 24, 1998. Pet. App. at 3a-5a. After considering proposed orders submitted by both sides, and AMICO's objections to Montrose's proposed order, the trial court entered a formal written order on December 11, 1998, finding "strong" evidence supporting a *prima facie* showing of AMICO's fraud, based on multiple indicia of fraud. To shield any work product documents or documents relating to litigation strategy, the trial court required AMICO to submit its documents for *in camera* review.

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5. As a factual predicate to considering the fraud motion, the trial court first heard lengthy argument on October 28 and November 3, 1998 on Montrose's supplemental motion to compel compliance with the court's prior order compelling AMICO to produce additional documents, which had not been produced, and many of which would specifically demonstrate AMICO's knowledge and documentation of the coverage afforded to the various corporate entities insured under the Stauffer insurance program, including Montrose.

C. Decisions Below

Although AMICO neglects to even mention it, the trial court's order was based upon California Evidence Code Section 956 and case law construing California's statutory exception to the attorney-client privilege. The trial court's fact-specific construction and enforcement of California's crime-fraud exception to the attorney-client privilege is unassailable. To invoke the crime-fraud exception under Section 956, the moving party must establish its *prima facie* case by presenting evidence from which a reasonable inference of fraud can be drawn. *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1262 (1988); *Nowell v. Superior Court*, 223 Cal. App. 2d 652, 657 (1963). The elements of fraud necessary to establish the exception are: (1) a misrepresentation of material fact; (2) knowledge of the representation's falsity; (3) intent to deceive; and (4) the right to rely on the representation. *BP Alaska*, 199 Cal. App. 3d at 1263.[6] Applying this standard, the trial court concluded that there was "strong" evidence that AMICO committed fraud in asserting the "named insured" defense, using the offices of its counsel, and therefore waived its attorney-client privilege.

The scope of the privilege waiver resulting from the trial court's finding of "strong" evidence of fraud is described in the *BP Alaska* decision: *all privileged documents reasonably*

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6. An insured has the right to rely on its insurer's truthfulness and assertions. *See, e.g., Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1414 (S.D. Cal. 1994) (right to rely on representations made between insured and insurer). Since Evidence Code Section 956 does not require a completed crime or fraud, no actual reliance or damages must be shown or proven. *BP Alaska*, *supra*, 199 Cal. App. 3d at 1262-63.

related to the ongoing fraud are discoverable. Id. at 1269 ("The documents in question must have a reasonable relation to the ongoing fraud to be discoverable under the crime-fraud exception"); *id.* at 1271 ("communications reasonably related to the fraud are discoverable"). In implementing this standard, if the party from whom production is sought "honestly believes one or more of the documents contain clearly unrelated material, the documents could be reviewed in camera and the irrelevant matter excised." *Id.* at 1269-1270.[7]

Since the crime-fraud exception to the attorney-client privilege applies if the privileged material reasonably relates to the subject matter of the ongoing fraud (*BP Alaska*, 199 Cal. App. 3d at 1269-1271; *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. at 1415), the trial court properly required AMICO to submit *in camera all* documents relating to its ongoing fraud in asserting the "named insured" defense, regardless of whether they were prepared in connection with the bad faith action or the appeals in the coverage actions. In accordance with California law, the trial court recognized that the subject matter of the fraud delineates the scope of the waiver, and found that any documents relating to the "named insured" issue which were prepared in connection with the bad faith action and the pending appeals regarding the duty to defend orders in *Canadian II* and *Canadian III* may reasonably relate to the ongoing fraud. *See* Pet. App. at 18a, 19a and 21a.

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7. *See also Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. at 1415 (under California law, crime-fraud exception requires disclosure of attorney-client communications made in one year, where client used attorney's services in following year to help perpetrate ongoing fraud).

Well over a month after the trial court announced its decision regarding the fraud exception to the attorney-client privilege, AMICO requested that the trial court stay its order until the pending appeals of the duty to defend orders in *Canadian II* and *Canadian III* are finally resolved. AMICO's prior stay motion had been denied, and AMICO made no attempt to satisfy the requirements for reconsideration under California Code of Civil Procedure Section 1008 when it requested a stay that would have brought the bad faith action to a standstill on the eve of trial. On January 13, 1999, the trial court summarily denied AMICO's renewed stay motion, allowing AMICO to seek appellate review of that decision along with the crime-fraud order.

Under the December 11 Order, AMICO was required to produce all documents relating to the "named insured" issue for *in camera* review within forty days of entry of the order, unless the order was stayed by AMICO's California appellate writ review. Since AMICO's certiorari petition for review was summarily denied by the California Supreme Court on April 21, 1999, AMICO was obligated to produce the documents on June 1, 1999. Instead, AMICO attempted to avoid its obligations by moving *ex parte* for an order that it does not have to turn over to Montrose any formerly privileged documents until this Court decides whether to grant AMICO's certiorari petition. The trial court denied AMICO's request, and AMICO did not request a stay from this Court.[8] To date, AMICO still has not provided all

8. As the Court is aware, neither the filing nor the granting of a petition for a writ of certiorari operates as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court. *See* 28 U.S.C. § 2101(f). Nor would AMICO's request that this Court stay an interlocutory discovery (Cont'd)

documents to the trial court as ordered. AMICO has simply attempted to cure its noncompliance by making a token submission of documents.

REASONS FOR DENYING THE WRIT

In light of the overwhelming evidence of fraud, and because AMICO utilized counsel in perpetrating this fraud, the trial court concluded that AMICO waived any attorney-client privilege attached to documents relating to the "named insured" issue. This decision rests on a fact-specific application of the law of California and raises no issue appropriate for review by this Court.

Although AMICO invokes the rhetoric of due process in an attempt to manufacture Supreme Court jurisdiction, the proceedings below demonstrate that the trial court has implemented all available procedural safeguards to protect AMICO's legitimate interests, in both the bad faith action and the pending appeals in the separate coverage actions regarding the duty to defend orders. To that end, the trial court gave AMICO ample opportunity to respond to the evidence presented by Montrose in support of the fraud motion, allowing AMICO to submit an opposition and a surreply to Montrose's reply brief, and present oral argument

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order have been warranted. *See, e.g., Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission*, 479 U.S. 1312 (1986) (only the execution or enforcement of final, as opposed to interlocutory, orders may be stayed to enable aggrieved party to obtain writ of certiorari from Supreme Court); *Bateman v. Arizona*, 429 U.S. 1302, 1304 (1976) (single Justice of the Court will only stay a state decision which the lower court refused to stay where a "demonstration of compelling necessity" has been made).

regarding this issue during multiple hearing days. After taking the motion under submission and carefully considering the matter, the trial court concluded that Montrose had met its burden of making a *prima facie* showing that AMICO utilized its counsel to fraudulently assert that Montrose was not an insured under the relevant AMICO policies. The trial court's order protects AMICO's rights completely by ordering *in camera* review of the documents, rather than direct production to Montrose. The court's order protects AMICO's work product and litigation files, and the trial court has the ability to redact or withhold from production any documents that would prejudice AMICO's litigation of its appeals. Under these circumstances, where the trial court has made every effort to protect AMICO's legitimate interests, AMICO's claim that it has been deprived of due process is absurd.

Equally unfounded is AMICO's claim that the trial court is enforcing its order in an attempt to insulate from appellate scrutiny the correctness of the "named insured" rulings, consequently depriving AMICO of its right to counsel and right of access to the courts in challenging those "named insured" rulings. First, AMICO mischaracterizes the nature of the pending appeals. AMICO's current appeals are not from the trial court's decision in October of 1997 granting Montrose's summary adjudication motion, and finding that Montrose is a "named insured" as a matter of law. AMICO's challenges regarding this "named insured" summary adjudication were denied by the California Court of Appeal and California Supreme Court. The trial court then reinstated prior orders directing AMICO to defend Montrose in the underlying environmental cases at issue in *Canadian II* and *Canadian III*, setting forth the procedure for AMICO to follow in defending the underlying actions. AMICO's current appeals are from these subsequent duty to defend orders.

Moreover, AMICO distorts the facts to make it appear as though the correctness of the trial court's ruling regarding the applicability of the crime-fraud exception to the attorney-client privilege somehow depends upon the outcome of the pending appeals. AMICO asserts that the rulings which are being challenged in the pending appeals form the very foundation for the trial court's crime fraud order, and that the trial court should therefore stay enforcement of the December 11 Order because the appellate court may conclude that there is a triable issue of fact regarding Montrose's status as a "named insured." A determination by the California Court of Appeal that a triable issue of fact exists regarding the "named insured" issue, however, would not undermine the trial court's order regarding the applicability of the crime-fraud exception to the attorney-client privilege. AMICO completely overlooks the distinction between a *prima facie* showing of fraud (which the trial court found) and an actual finding of fraud (which remains to be determined). The trial court ruled that a *prima facie* showing of fraud sufficient to vitiate the attorney-client privilege under California law had been established, but left the ultimate determination of actual fraud for the jury. *See* Pet App. at 9a ("The ultimate determination of the above evidence offered by Montrose will be for the jury to decide. However, for purposes of discovery motions the Court can conclude that there are strong reasonable inferences of the above as being factual so as to constitute waiver of the attorney-client privilege"). Consequently, a ruling that there is a triable issue of fact regarding Montrose's status as a "named insured" in the pending appeals (although unlikely) would be entirely consistent with the proceedings in the bad faith action, where a triable issue of fact remains regarding whether AMICO

actually committed fraud in asserting the "named insured" defense with the assistance of counsel.[9]

In any event, AMICO has exercised its right to counsel and corresponding right of access to the courts during its writ petition to the California Court of Appeal and petition for review to the California Supreme Court. Since the California appellate courts denied AMICO's writ petition and petition for review, affirming the trial court's finding of "strong" evidence of *prima facie* fraud, AMICO has had its day in the appellate courts on this issue and the disclosure of privileged documents does not result from a deprivation of due process — it results from AMICO's own conduct which waived the privilege.

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9. *See, e.g., Grace v. Ins. Co. of North America*, 944 P.2d 460, 468, n.18 (Alaska 1997) ("While an issue of fact remains as to whether this settlement actually was the product of fraud, the evidence is sufficient to present a prima facie case of fraud"); *BP Alaska*, 199 Cal. App. 3d at 1262-1263 ("Evidence Code section 956 does not require a completed crime or fraud. It applies to attorney communications sought to enable the client to plan to commit a fraud, whether the fraud is successful or not. *Moreover, we are not reviewing the merits of a fraud cause of action . . . but rather we are reviewing the merits of a discovery order to determine if [the proponent of the crime fraud exception] will have access to communications between [the opposing party] and its attorneys to aid [the proponent] in proving its causes of action*") (emphasis added). *See also In re Feldberg*, 862 F.2d 622, 625-626 (7th Cir. 1988) (describing the reviewing court's role as determining whether the evidence calls for inquiry regarding the applicability of the crime-fraud exception, not whether it supports a verdict).

I.

THIS COURT LACKS JURISDICTION TO REVIEW THE TRIAL COURT'S RULING

A. The Judgment Below Is Interlocutory And Not "Final" For Purposes Of Supreme Court Review

This Court's review of state court decisions is limited to "[f]inal judgments or decrees rendered by the highest state court of a State in which a decision could be had." 28 U.S.C. § 1257(a). This Court lacks jurisdiction to review the decision below because an interlocutory discovery order by the trial court regarding the applicability of the crime-fraud exception to the attorney-client privilege is not a "final" order within the meaning of 28 U.S.C. § 1257.

The general rule is that, to be reviewable, the state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Jefferson v. City of Tarrant, Alabama*, 118 S. Ct. 481, 485-486 (1997) (*quoting Market Street R. Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551 (1945)). The decision below is not "final" in either required sense — the trial court's order is simply an interlocutory discovery order regarding Montrose's motion to compel privileged and non-privileged documents and testimony pursuant to the crime-fraud exception to the attorney-client privilege. Far from being an effective determination of the litigation, the trial court's decision merely resolves one discovery dispute between the parties regarding the existence and scope of a

litigant's waiver of the attorney-client privilege. The trial court's order does not resolve the entire litigation, nor does it even resolve a portion of the case. A trial on the merits still remains regarding AMICO's bad faith liability and the question of whether AMICO has engaged in fraud in asserting its "named insured" defense. *See, e.g., Jefferson v. City of Tarrant, Alabama*, 118 S. Ct. at 486 (decision of state supreme court was not final where it answered a single certified question that affected only two of four counts in complaint and remanded case for further proceedings including probable trial on merits of state law claims).[10]

Although this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), identified four categories of cases in which a judgment is final even though further proceedings are pending in the state courts, the present case does not fit into any identified exceptional category. AMICO concedes that this case does not fall within three of the four exceptional categories, but contends that this case fits within the third category of cases: "[W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In each of the cases cited as falling within this exception, the party seeking review of the federal question

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10. *See also Cunningham v. Hamilton County*, 119 S. Ct. 1915 (1999) (trial court's discovery order is interlocutory and is not a "final judgment" within appellate court jurisdiction); *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam) ("Because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation' ") (citation omitted); *Collins v. Miller*, 252 U.S. 364, 370 (1920) (expressly holding that a judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved").

might prevail on other grounds and thereby lose the opportunity for review because the issue is moot, or might lose on other grounds but be prevented by state law from seeking review.[11] The present case falls outside this category since further proceedings on the merits remain, and AMICO can pursue appellate review following a final judgment in that action. *See, e.g., Flynt v. Ohio*, 451 U.S. 619, 621-622 (1981) (holding that the judgment was not final within any of the four exceptions identified in *Cox* and finding that review "can await final judgment without any adverse effect upon important federal interests" despite publisher's claims that prosecution violated both the First and Fourteenth Amendments); *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 127 (1981) (declining to address the constitutional issues "until the proceedings in the trial court are finally concluded and the state appellate courts have completed their review of the trial court record").

AMICO's remaining argument — that this Court should disregard the requirement of finality because the trial court's order immediately deprives AMICO of its right to counsel and access to the courts while the appeals in the coverage actions are pending (Pet. at 9) — is specious. First, the trial court's order adequately protects AMICO's rights in the pending appeals by requiring AMICO to submit the documents *in camera* rather than directly to Montrose. The trial court can then excise material that falls outside the scope

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11. For example, in *California v. Stewart*, 384 U.S. 436, 498 n.71 (1966), the California Supreme Court ordered retrial of a criminal defendant on the ground that his confession had been improperly admitted. If he were again convicted, the federal question of the admissibility of the confession would be mooted, whereas if he were acquitted, state law precluded the State from seeking review of the acquittal.

of the waiver and that would prejudice AMICO's litigation of its appeals. Second, rather than being deprived of its right to prosecute the pending appeals, AMICO has pursued its appeals (which are now scheduled to be argued on August 24, 1999) while evading its obligation to disclose all the documents which should have been produced as of June 1, 1999, including documents prepared in connection with the pending appeals that relate in any way to the "named insured" issue. If this Court accepted review of a state decision every time a litigant asserted that its rights were being immediately impeded, the Court would be required to read the finality requirement completely out of the statute. *See, e.g., Flynt v. Ohio*, 451 U.S. at 622 (declining to adopt an expansive construction of the exceptions in *Cox* that would "swallow the rule" requiring a final judgment).[12]

As this Court has stated, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

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12. Moreover, an order to compel production of attorney-client privileged documents is *not* an exception to the rule that interlocutory judgments are non-appealable even though the aggrieved party claims irreparable harm from forced disclosure. *See, e.g., Boughton v. Cotter Corp.*, 10 F.3d 746, 749-750 (10th Cir. 1993) ("The practical consequences of the district court's decision on the controversy . . . can be effectively reviewed on direct appeal following a judgment on the merits. If [the appellate court] determines that privileged documents were wrongly turned over to the plaintiffs. . . , we can reverse any adverse judgment and require a new trial, forbidding any use of the improperly disclosed documents. . . . [I]n virtually every case in other circuits involving similar attorney-client privilege claims, the courts have refused to take jurisdiction. . . . '[E]ven orders to produce information over strong objections based on privilege are not appealable, despite the claim that once the cat is out of the bag the privilege is gone' ").

Jefferson v. City of Tarrant, Alabama, 118 S. Ct. at 486 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Because the decision below is merely an interlocutory discovery order that does not fall within any of the exceptional categories in *Cox*, this Court lacks jurisdiction to review the trial court's order.

B. The Judgment Below Rests Solely Upon An Adequate And Independent State Ground

It is undoubtedly "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [the Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). In the present case, the trial court's judgment was based entirely upon well-established California privilege law, which requires the disclosure of privileged attorney-client communications once a *prima facie* showing of fraud is established. *See* Pet. App. at 7a ("Montrose's Motion to compel production of AMICO's named insured documents' [sic] privileged and non-privileged related documents and testimony is granted under the fraud exception to the attorney-client privilege"). Moreover, AMICO's own arguments (both written and oral) in opposition to Montrose's fraud motion were based entirely on California law.[13]

13. For example, AMICO's opposition to Montrose's fraud motion cites to only two cases: *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240 (1988), which construed California Evidence Code Section 956, and *St. Paul Fire & Marine Ins. Co. v. T.M. Coss*, 80 Cal. App. 3d 888 (1978), which was simply cited for a proposition regarding insurance coverage. During the (Cont'd)

In *Coleman v. Thompson*, 501 U.S. 722, 728 (1991), the Court reaffirmed that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *See also Harris v. Reed*, 489 U.S. 255, 262 (1989). Although the Court developed a presumption in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), that where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so,"[14] *Coleman* made it clear that this presumption only applies in limited cases where certain conditions precedent are met.

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hearing on Montrose's fraud motion, there were numerous references, by both the trial court and the parties, to California case law construing the crime-fraud exception to the attorney-client privilege. *See, e.g.*, November 4, 1998 Transcript of Proceedings, set forth in the appendix to this brief ("Resp. App.") at 2a ("Trial Court: Okay, there are — obviously, the first area that the court has to consider is whether there's a prima facie case for a fraud, and, of course, BP Alaska sets out the four prongs of that, and the court — and I'm sure I'll hear argument on this"); *id.* at 3a-14a (counsel for Montrose analyzing the applicability of the crime-fraud exception under Evidence Code Section 956 and California law); *id.* at 15a-30a (counsel for AMICO analyzing the applicability of the crime-fraud exception under Evidence Code Section 956 and California law).

14. This presumption can be overcome by a "plain statement in [the state's] judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. at 1041.

> The presumption . . . applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision. In the rest of the cases, there is little need for a conclusive presumption.

501 U.S. at 739-740; *id.* at 735 ("A predicate to the application of the . . . presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law").

The state court's decision at issue in the present case neither discussed nor purported to decide any federal claim, and there is no reasonable basis for concluding that the decision rested primarily on federal law. Thus, the condition precedent required for invocation of the "plain statement" rule simply does not exist.[15]

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15. The state court decision does not fairly appear to rely on federal law, nor is it interwoven with federal law, such that the state court evidently felt compelled by federal law to rule in the manner it did. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605, 625 (1989) (Court exercised jurisdiction over state decision where state court focused solely on federal statutes and felt bound by construction adopted in this Court's prior decisions). Rather, the state court's disposition of the matter was solely based upon California's statutory exception to the attorney-client privilege. To the extent that AMICO's petition simply rests on an argument that the trial court misapplied or misconstrued a California statute, such allegations do not provide a basis for this Court's review. *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938) (decisions which simply "concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes" are not reviewable).

This case stands in stark contrast to other cases where the state courts had expressly discussed and decided the merits of the federal claims, providing some basis in logic for applying the "plain statement" rule. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 36 (1996) (Supreme Court had jurisdiction where opinion clearly relied upon federal law, citing almost exclusively to federal cases); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (state ground not "independent" where state court expressly rejected merits of federal claim and then applied default rule which was totally "depend[ent] on an antecedent ruling on federal law"); *Massachusetts v. Upton*, 466 U.S. 727 (1984) (Court reviewed a state decision that relied solely on an interpretation of the Court's decision in *Illinois v. Gates*, 462 U.S. 213 (1983)).

In addition, the summary orders by the California Court of Appeal and the California Supreme Court denying AMICO's writ petition and petition for review also did not address the merits of AMICO's federal claims, which were merely asserted as an afterthought following the trial court's ruling finding "strong" evidence supporting a *prima facie* showing of fraud. Addressing the issue of unexplained orders in the context of a habeas corpus proceeding, this Court held that it will look to the last reasoned opinion and will not presume that a later unexplained decision silently disregarded the earlier decision and considered the merits of the federal claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-804 (1991) ("The maxim is that silence implies consent, not the opposite — and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. The essence of unexplained orders is that they say nothing. We think that a presumption which gives them *no* effect — which simply 'looks through' them to the last reasoned decision —

most nearly reflects the role they are ordinarily intended to play") (emphasis in original).[16]

II.

THE TRIAL COURT PROPERLY FOUND THAT AMICO WAIVED ITS ATTORNEY-CLIENT PRIVILEGE, AND DENIED AMICO'S RENEWED REQUEST TO STAY THE CASE, IN A MANNER THAT DOES NOT RAISE ANY CONSTITUTIONAL QUESTIONS

AMICO's entire petition for writ of certiorari is premised upon AMICO's dissatisfaction with the way in which the trial court construed and enforced Evidence Code Section 956. A review of the decision below, however, reveals that the trial court applied settled California privilege law, and entered a carefully-considered and well-supported ruling that AMICO's privileged communications were subject to *in camera* review under the crime-fraud exception to the attorney-client privilege.

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16. In addition, this Court has held that if no opinion was written and it appears that the judgment might have rested upon a nonfederal ground, the Court will not take jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *see also Stembridge v. Georgia*, 343 U.S. 541, 547 (1952) ("Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment"); *Lynch v. New York*, 293 U.S. 52, 54 (1934) ("It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it").

Upon finding "strong" evidence to support a *prima facie* showing that AMICO is engaging in ongoing fraud in asserting its "named insured" defense, the trial court did not require AMICO to turn over privileged documents to its adversary. Rather, to protect AMICO's interests, the trial court allowed AMICO to submit the documents *in camera* so that the trial court could shield AMICO's work product documents, as well as documents relating to trial or appellate strategy. In this manner, the trial court could ensure that only documents reasonably related to AMICO's ongoing fraud are disclosed to Montrose.

Despite the trial court's efforts to ensure that AMICO's interests are properly safeguarded, AMICO alleges that the trial court has enforced its order to purposefully deprive AMICO's due process rights to counsel and of access to the courts. Again, AMICO's allegations merely arise from its disagreement with the trial court's construction and enforcement of California privilege law. Once the trial court found that Montrose met its burden of establishing a *prima facie* showing of fraud, the trial court had the power to require AMICO to submit any documents that fall within the subject matter of the fraud for *in camera* review, including documents prepared in connection with the pending appeals. The trial court was not required to grant AMICO's renewed motion to stay enforcement of the December 11 Order, especially because AMICO's prior stay motion was denied and AMICO made no effort to satisfy the requirements for reconsideration under California Code of Civil Procedure Section 1008. More importantly, however, AMICO's allegations that the trial court has denied AMICO due process simply by enforcing its order are frivolous.

AMICO has neither been denied its right to counsel nor its right of access to the courts. First, AMICO in fact *has already had immediate and direct access to the appellate courts* through its petition for writ of mandate and petition for review challenging the trial court's fraud order. AMICO has had its day in the appellate courts, and the courts have denied AMICO's writ petition and petition for review, affirming the trial court's finding of "strong" evidence of *prima facie* fraud. In light of these facts, AMICO's contention that the trial court has "insulated" its orders from scrutiny is demonstrably false. Contrary to AMICO's assertions, the disclosure of formerly privileged information does not result from the trial court's purposeful denial of AMICO's due process rights, it merely results from AMICO's own conduct which *waived* the attorney-client privilege relating to the "named insured" issue.

Second, AMICO's due process rights to counsel and access to the courts are being protected completely by the trial court's *in camera* review of the documents. *See, e.g., BP Alaska*, 199 Cal. App. 3d at 1261 (approving of use of *in camera* review by the trial court to determine whether documents contained work product). The trial court can properly excise documents which fall outside of the scope of waiver, and which relate to trial or appellate strategy. Therefore, the trial court's order does not require AMICO to forfeit any legitimate confidential advice and guidance of its counsel.[17] The attorney-client privilege, like any other

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17. In any event, AMICO's rights in the pending appeals obviously have not been prejudiced, since oral argument on the appeals is now scheduled for August 24, 1999 and AMICO has refused to comply in full with the trial court's order which required AMICO to produce all documents relating to the "named insured" issue as of June 1, 1999.

evidentiary privilege, is subject to limitations.[18] If every trial court order which vitiated the attorney-client privilege based upon a *prima facie* showing of fraud were subject to attack on the ground that it denied a litigant its right to counsel and access to the courts, the attorney-client privilege would no longer be subject to *any* qualification, but rather, would be converted into a constitutionally mandated absolute rule.

Finally, although the right to counsel cannot be interfered with arbitrarily, it must yield to a greater public interest in ensuring that an attorney's services are not utilized in furtherance of a fraud. *See, e.g., State v. Charlesworth*, 951 P.2d 153 (Ore. App. 1997). In *State v. Charlesworth*, the court held that application of the state's crime-fraud exception, which resulted in the disclosure of information from defendant's legal file, did not violate the defendant's right to counsel because "[t]hat right depends on an effective attorney-client privilege. The privilege does not extend to communications that come within the crime-fraud exception. The recognition and enforcement of that exception does not violate a defendant's constitutional right to counsel." 951 P.2d at 166.[19] This Court has long recognized that the right to counsel does not include the right to use the services of counsel in furtherance of a fraud. *Nix v. Whiteside*, 475 U.S.

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18. *See, e.g.*, Cal. Evid. Code § 981 (crime-fraud exception to marital communications privilege); Cal. Evid. Code § 997 (crime-fraud exception to physician-patient privilege); Cal. Evid. Code § 1018 (crime-fraud exception to psychotherapist-patient privilege).

19. Nor is the corresponding right of access absolute or unconditional. *See, e.g., Johns v. Town of Los Gatos*, 834 F. Supp. 1230, 1232 (N.D. Cal. 1993) (upholding order requiring litigant to seek permission from the court prior to filing any future suits in light of litigant's history of vexatious litigation).

157, 173 (1986) ("[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury").[20]

In addition, the judgment below does not raise any constitutional questions because it does not conflict with the decisions of this Court or any other state court. The purpose of the attorney-client privilege is to encourage full and frank communications between lawyers and their clients and thereby promote broader public interests in the observance of law and administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is well-settled that the attorney-client privilege was *not* designed to encourage those planning to commit a wrong to obtain legal assistance in their endeavor. *See Glade v. Superior Court*, 76 Cal. App. 3d 738, 745 (1978). To protect against such a perversion of the attorney-client privilege, this Court created the crime-fraud exception to the privilege to assure that the " 'seal of secrecy,' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States v. Zolin*, 491 U.S. 554, 563 (1989) (citation omitted).[21]

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20. In *Nix v. Whiteside*, this Court found that an attorney's threat to withdraw as counsel and expose the defendant's plan to commit perjury did not deprive defendant of the right to counsel. 475 U.S. at 174 ("An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct").

21. *See also Clark v. United States*, 289 U.S. 1, 15 (1933) ("The [attorney-client] privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told").

Although it is true that this Court has left open "[t]he quantum of proof needed to establish admissibility" under the crime-fraud exception, *Zolin*, 491 U.S. at 565 n.7, it simply cannot be said that the trial court's judgment below was based on insufficient evidence to satisfy the *prima facie* showing of fraud presently required under California law.[22]

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22. The trial court based its ruling on multiple indicia of fraud. *See* Pet. App. at 8a-9a. The following summary of the extensive evidence presented by Montrose irrefutably demonstrates that AMICO knew that Montrose was insured and used the offices of counsel to conceal and misrepresent the material fact of Montrose's status as an insured: AMICO assigned location codes to Montrose facilities under the Stauffer policies and produced a critical "smoking gun" document (which had previously been concealed, while AMICO foisted upon the trial court, Montrose and AMICO's expert a completely inapposite schedule of locations appurtenant to workers' compensation *not* general liability coverage) listing Montrose's two locations on the schedule of locations insured under the Stauffer liability policies; AMICO agreed to duplicate the coverage provided by the prior carrier, INA, coverage which included Montrose; AMICO used Montrose loss history from INA (reflecting Montrose losses) in underwriting the AMICO policies; AMICO used Montrose's loss, payroll, sales and property data in calculating its base premiums; AMICO specifically covered Montrose's automobiles within the Stauffer coverage; AMICO personnel inspected Montrose's facilities; AMICO set massive reserves on Montrose's claims; AMICO paid an earlier Montrose loss without question; and AMICO tried to buy back its coverage from Montrose. The evidence led AMICO's high level coverage investigator Mr. John Noe to conclude in two extensive reports that Montrose readily was covered under the AMICO policies' "named insured" provision. This evidence also led Mr. Richard Wildey, AMICO's chief claims supervisor on this matter, to write that "*[t]he coverage for Montrose flows from the policies issued to Stauffer Chemical.*" Montrose also presented extensive evidence to the trial court that — acting through counsel — AMICO took steps to conceal evidence that Montrose was insured, despite a duty to disclose such information to Montrose, and intended to deceive Montrose through its misrepresentation and concealment.

Moreover, this Court clearly endorsed the *in camera* procedure which the trial court implemented to enforce its order. *Id.* at 572 (noting that *in camera* review "is a [lesser] intrusion upon the confidentiality of the attorney-client relationship than is public disclosure") (citation omitted).

In sum, the trial court's decision is consistent with this Court's precedent which has recognized the validity of the crime-fraud exception, and endorsed the method in which the trial court enforced its order by protecting AMICO's interests and ordering *in camera* review of all documents relating to the "named insured" issue.[23] Accordingly, AMICO's petition for writ of certiorari of the trial court's decision is unfounded.

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23. The trial court's decision is also consistent with the majority of other states, which also recognize the crime-fraud exception to the attorney-client privilege. *See, e.g.*, Alabama (Evid. Rule 502(d)(1)); Alaska (Evid. Rule 503(d)(1)); Arizona (*State v. Fodor*, 880 P.2d 662, 670 (1994)); Arkansas (Evid. Rule 502(d)(1)); Colorado (*Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (1982)); Florida (Evid. Code § 90.502(4)(a)); Georgia (*Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 277 S.E.2d 785, 790 (1981)); Hawaii (Evid. Rule 503(d)(1)); Idaho (Evid. Rule 502(d)(1)); Illinois (*In re Marriage of Decker*, 606 N.E.2d 1094, 1101 (1992)); Indiana (*United States v. Aldridge*, 484 F.2d 655, 658 (7th Cir. 1973), *cert. denied*, 415 U.S. 921 (1974)); Kansas (Evid. Rule § 60-426(b)(1)); Kentucky (*Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 487 (1991)); Louisiana (Evid. Code § 506(C)(1)(a)); Maine (Evid. Rule 502(d)(1)); Maryland (*Fraidin v. Weitzman*, 611 A.2d 1046, 1077 (1992)); Massachusetts (*Purcell v. District Attorney for the Suffolk Dist.*, 676 N.E.2d 436, 439 (1997)); Michigan (*People v. Paasche*, 525 N.W.2d 914, 917-918 (1994)); Minnesota (*Levin v. C.O.M.B. Co.*, 469 N.W.2d 512, 515 (1991)); Mississippi (Evid. Rule 502(d)(1)); Nebraska (Evid. Rule § 27-503(4)(a)); Nevada (Nev. Rev. Stat. § 49.115); New Hampshire (Evid. Rule 502(d)(1)); New Jersey (Evid. Rule 26(2)(a)); New Mexico (Evid. Rule 11-503(d)(1)); North Dakota (Evid.

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CONCLUSION

For the reasons set forth above, respondent respectfully requests this Court to deny the petition for certiorari.

Respectfully submitted,

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Rule 502(d)(1)); Ohio (*State ex rel. Nix v. Cleveland*, 700 N.E.2d 12, 16 (1998)); Oklahoma (Evid. Code § 2502(D)(1)); Oregon (Evid. Code § 40.225, Rule 503(4)(a)); South Dakota (Codified Laws § 19-13-5); Texas (Evid. Rule 503(d)(1)); Utah (Evid. Rule 504(d)(1)); Vermont (Evid. Rule 502(d)(1)); and Wisconsin (Evid. Stat. § 905.03(4)(a)).

APPENDIX

APPENDIX — TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES DATED NOVEMBER 4, 1998

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 55
HON. JOSEPH R. KALIN, JUDGE

No. BC 130486

MONTROSE CHEMICAL CORPORATION,

Plaintiff,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

November 4, 1998

* * *

MS. STRAUSS: Thank you, your Honor.

(Pause on record)

THE COURT: Okay, there are — obviously, the first area that the court has to consider is whether there's a prima facie case for a fraud, and, of course, BP Alaska sets out the four prongs of that, and the court — and I'm sure I'll hear argument on this.

As far as a prima facie case, the evidence tends to point that way, but the four-prong raises an issue, and the four-prong, of course, is that is to Montrose's right to rely upon the representation, Montrose's actual reliance upon the representation. There's some legal issues there that are involved, and, of course, the Worley (phonetic spelling) case comes into that.

The — another area that comes up, and that is assuming that to get that far there were misrepresentations and there was fraud on the — on behalf of AMICO, if you — again to the Worley case, and the Worley case you have a situation where if there are more than one defenses set up by the defense insurance carrier, must each defense be knocked down by the plaintiff, because if any one single defense was a proper defense, then Worley seems to indicate that the fraud exception would not be applicable there, and, of course, in this particular case, there's a further complication, and that is, is that perhaps factually at different times AMICO may probably — I'm going to want the weekend, and I do want to get it out of the way because it's important on where you're going to go in this case, so I'll — you know, I'll rule on it

Monday, and either in your presence or in writing, however you want to do it, but I need the weekend to — after I hear your arguments. But I'm not going to hold onto it for a long time. I think it's important I work on it. That's all we're doing right now anyway.

Go ahead, counsel.

MS. WILKES: Thank you, your Honor. I'll proceed on the four — I believe it's four points that the court raised. But first of all, I'll note that I'm a little disappointed because I have my 22-page outline that I looked at about a million times, and I can go through, of course, all the evidence in laborious detail, none of which has been objected to in the form of any evidentiary objections filed by AMICO, and I'm more than happy to do that. But for now, I'll confine myself to the points that the court raised.

THE COURT: Yes, and I'm not restricting either counsel in terms of time you want to use.

MS. WILKES: And I'm more than prepared to submit on the voluminous papers, which we appreciate the court accepting and reviewing, and all the evidentiary submission. I think it's the kind of thing that's best studied in the quiet of chambers and analyzed, and that really very little Mr. Chesney and I can say back and forth about that evidence would shed any light on — further light on what's there and evident from the record.

Turning to the points that the court raised, the BP Alaska indeed sets forth the four prongs of the prima facie

case, and the fourth prong is reliance, and the court raised the question of what showing Montrose has made on reliance, and first of all, as we pointed out in our papers, the law — and it's set forth in the Cunningham case — is that an insured has the right to rely on representations made by its carrier, and so that's really the concomitant of the insurer's affirmative duty to disclose facts relating to coverage.

And at page 41 of our opening brief we cite a number of authorities relating to that duty. For example, 10 California Code of Regulations, Section 2695.4(a) says, and I quote: (Reading:)

> "Every insurer shall disclose to a first party claimant or beneficiary all benefits, coverage, time limits or other provisions that may apply to the claim."

And then there are a number of additional California cases that we've cited that stand for the proposition that the insurer has the duty to inform the insured of the existence and amount of coverage, even when benefits aren't ultimately payable under the policy. So, for example, the Ramirez case, the Davis vs. Blue Cross case, and several others cited on pages 41 to 42 and note 95.

For example, the Davis vs. Blue Cross says, (Reading:)

> "An insurer has been required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded under the policy."

So in terms of reliance, reliance need not actually be shown, but the insured — to make out this prima facie case — but the insured has the right to rely on the representations that the insured makes — or the insurer makes and just accept those at face value. That's part of the quasi-fiduciary or special relationship that inheres between the insured and the insurer.

THE COURT: Well let me ask this question. If you have a right to rely then, does that — what if Montrose sits there and says, "We don't rely upon this because we know that they're cheating us; fraudulently doing everything bad with us, and we know this"? So are they relying on it?

MS. WILKES: Well — and I think I can see where the court is heading, and that's kind of a question of what duty does the insured have to make its own investigation as opposed to blindly relying on what the insurer says, and if the court looks at the facts in this case, this is in [sic] the situation where Montrose blindly relied on what AMICO was saying. Instead, it went ahead and litigated its rights and established them again and again, and in the face of that, AMICO continued to take the position that Montrose was not insured. So Montrose — Montrose had the right the right to rely and should have been given — and AMICO had the duty to disclose, and Montrose should have been given the correct information, but Montrose still believed that AMICO was wrong and pursued its legal rights. It's done everything that it can to make its position known.

But in addition a lot of the salient facts that evidenced fraud never came out until this case — the

discovery in this case unfolded, and I can give the court a couple of examples.

First of all and this is what really, I think, tipped the scales, was when despite discovery requests in Canadian I and Canadian II and Canadian III, which sought — and would have — should have resulted in the production of this precise information, it wasn't until this case, after your Honor ruled in-camera and it went all the way up through the appellate courts, that Mr. Wildey's memoranda, saying that the coverage for Montrose — the coverage for Montrose flows from the policies issued by Stauffer Chemical — that that document came to light. Now that was a handwritten memo from Mr. Wildey to Mr. Valloy (phonetic spelling) in the home office. No claim of privilege could attach to that whatsoever, and Mr. Wildey wrote on the top of it, "Please pull, REW." A clear intent, right on the face of the document to conceal it, and somebody did pull it, and it wasn't produced in Canadian I ever. So finally in this case, we get that document.

We also in this case get for the first time reserve information which would show that AMICO was heavily reserving both loss and expense reserves on these claims at the very time that it was denying its duty to defend and its duty to indemnify, and reserves, under California law — and we cited the court the cases — those are indicative of a knowledge of the duty to provide coverage. Those are evidence that coverage exists in the mind of the insured or — I'm not saying that clearly. Those show that the insurer knew there was coverage. That's what the California cases say.

But even more importantly, that's what AMICO's own witnesses say. Mr. Huffer testified, "We never set reserves unless there's a duty to indemnify." I mean that's what he said, and here there are these huge reserves. So we received that discovery in this case.

In addition, we learned that AMICO's claims — highest claims officials in their home office had authorized Mr. Wildey to spend nearly $5 million to buy back the coverage from Montrose and Stauffer. Well you don't buy back coverage that you've never given. I mean — so that was another fact.

And then we also learned that counsel for AMICO was advising AMICO that it should have been defending Par Richmond as of 1990. Why would counsel advise to defend a party that they didn't believe was really insured? I mean there are all these things that came to us that coalesce, that brought the fraud to the fore in this case.

And so then Montrose realized that it had been deceived, and as a result of that, went back and pieced together, painstakingly, the history, and we see that indeed when — and this leads me back into all the different elements, which I won't go through, but, for example, one was the only loss run of what should have been scores of loss runs produced and available on all these different policies, all these different claims — only one loss run produced, and mysteriously, that loss run, which had gone to Mr. Kimberly in home office technical claims was copied at askewed angles so the location code for Montrose wasn't on there.

I mean, the picture as one pieces together the components becomes clearer and clearer, but it's not until — it's not until one knows that indeed Mon — that indeed AMICO knew all along that there was coverage — that one could even believe that there would be such fraud.

So I don't know if I've answered the court's question on reliance.

MR. CHESNEY: Your Honor, would you like to argue these one at a time or just have Ms. Wilkes go through all of them.

THE COURT: Probably let her finish them and then pick up.

MR. CHESNEY: Okay. That's fine.

MS. WILKES: The second one, your Honor, let's see, was — oh, the — if there were —

THE COURT: More than one defense brought up.

MS. WILKES: — more than one defense, and that's actually an interesting question that comes out of the Worley case, but I don't think that it raises any issue here, and I'll tell the court why.

As the court knows, there were seven carrier/ insurers. AMICO was one of those seven. A couple dropped off because of financial problems, but they were dealt with as a group in the trial court, the Court of Appeal and the

Supreme Court, and at each level, the courts found that the various defenses that the carriers had asserted to their duty to defend were unmeritorious, vis-a-vis, the duty to defend. They might ultimately be valid defenses, vis-a-vis the duty to indemnify, but the argument is that there is no occurrence or that there was — that the insured expected or intended or triggered coverage, all those things turned on the underlying facts at issue, and they didn't defeat the duty to defend, and the court, having gone through all this, knows this well.

AMICO was in a unique position, however, because in addition to having all those defenses, that little grouping, it had a separate named insured defense, and so when the other carriers lost on those issues and AMICO lost on those issues, AMICO nonetheless kept asserting the named insured defense and saying, "Well, we're different because a duty to defend never arises to a stranger to a contract; therefore, the duty to defend" — and I think that's a debatable proposition in and of itself, but that's an argument for another day. But the point is that AMICO used this one extra defense that it had throughout, from cradle to grave in this litigation, to extricate itself from what was becoming an increasingly disastrous situation for the carriers in terms of the legal rulings that were mounting against them.

And that really segues into the third point, which I think is a subset of the second point, was this defense consistently asserted throughout, or is it one that the court needs to parse time-wise the relevant documents? And absolutely, your Honor, this was a defense that was asserted throughout with, let me say, one qualification. In 1980 — well, the Stringfellow case notice was given around 1982 or

'83, and then Newman and Par Richmond came subsequent to that, so that by 1985, we had interim defense agreements in place and in two of the cases, and then a denial of coverage by AMICO in the Par Richmond case, and at that point in time — and the court can see it from the record — and this is part of the showing of fraud — AMICO had never asserted a named insured defense. They received notice letters and they wrote back and they said, you know, "Well, we're considering it," or, "When you really need a defense, give us a call," but they never said — and they even put on the re line Montrose/Stauffer as the insured. But they never said, "You're not an insured."

What happened is you see an evolution over time. In late-1985, November of 1985, Ms. Gottschalk, of Drinker, Biddle & Reath, writes a letter to Mr. Rotrosen directly, not through counsel, and says, "Mr. Rotrosen, what do you have, what do you do know that would show that Montrose has coverage?" and Mr. Rotrosen writes back, and that was the first time that there was really any hint — she says, "There's a significant question as to whether or not Montrose was a named insured under the policy," and during this time, the internal documents at AMICO were all reflecting that Montrose was indeed an insured. We showed you all those set-up forms where the name of the insured was entered; not the claimant, but the insured, and it was entered and it said Montrose.

And so obviously the people that were filling out the forms at AMICO still thought Montrose was an insured, and it's interesting because Mr. Wildey testified that at the time that set-up form is filled out, there has to be a

determination that there's coverage and they have to have the name of the insured and they have to have the location of the insured, and so clearly that set-up form is not a ministerial thing; it's the first step in setting up the claim file.

But anyway, back to the main point, which is the evolution of this defense. So then pretty much things are quiet; the litigation is filed; there's discovery back and forth in Canadian I.

And then what happens is in 1989, Judge Wisot enters the order on the duty to defend, and all of the sudden then there's a flurry of activity relating to the named insured issue; discovery back and forth, and then the cross-motions are brought.

And I should back up. I skipped a step. In 1986, Mr. Wildey writes a letter to Tom Edwards regarding Par Richmond and says, "AMICO is not going to defend Par Richmond, and here's the six reasons: Number one is Montrose is not a named insured," and then the other five are the standard laundry list of reasons that are given every time an environmental claim is asserted; not an occurrence during the policy period; expected or intended, blah, blah, blah. So at least as of '86, they were thinking about it, but it didn't really become a hot issue, shall I say, until '89 when the duty to defend order, which encompassed Par Richmond, which they were defending, was entered, and then the motions were going back and forth on the named insured issue in '90.

And then in '89, Mr. Wildey's deposition was taken, and the court will remember at that deposition, Mr. Wildey said, "We don't know whether Montrose is an insured or not. Discovery is still ongoing. There's a possibility that Montrose may not be an insured, and so we're not providing coverage." But he said there's — you know, "There's a substantial question and we haven't made a determination one way or another." So they were clearly looking at it.

Now, however, when he's deposed, Mr. Wildey says in this case, "It's been our opinion throughout, the last nine years, that Montrose was not an insured." So whether they were settled in their belief or not at a particular times, this is the issue that's been percolating in the case as AMICO's primary defense since at least '86, when Mr. Wildey — yes, Mr. Wildey wrote his first letter to Mr. Edwards regarding the refusal to defend at Par Richmond. But clearly even before when Ms. Gottschalk wrote her first letter of inquiry, they were already thinking about that, and the court can tell from its own knowledge, as well as the voluminous pleadings that we've included as exhibits, which are only the tip of the iceberg, AMICO has litigated this issue to death. I mean not just in California, but they filed two separate lawsuits in New York while the coverage litigation was pending in California, one of which was after Judge Wisot had made his determination on the duty to defend and the determination that Montrose was a named insured, and they filed a declaratory relief action back to New York seeking an adjudication that Montrose was not insured under the policy, and those pleadings are attached. We have volumes and volumes of appellate pleadings, including declarations signed by counsel under penalty of perjury throughout the '89

through — really up to the present period, saying that AMICO's position is that Montrose was not a named insured under this policy.

So that has been — that has been their number one defense, and it has been the defense that they've used to differentiate themselves from the other carriers and avoid what has been clearly a succession of adverse rulings on the duty to defend, which they have said doesn't apply to them or don't apply to them because they're different because Montrose is not a named insured.

On a last point, your Honor, if the court rules in favor of Montrose, what documents would Montrose be entitled to, I can't find any fault with the court's preliminary indication; AMICO to the attorneys, I believe, yes, that we would be entitled to that. The attorneys to AMICO, I think that those would have to be reviewed by the court in camera because the law is — although AMICO has never brought it out, but the law is that work product privilege is not waived under the crime fraud exception, and I think it would be incumbent upon the court to redact those documents where there was an intermingling of work product material and what would be just purely attorney/client privilege communication, such as transmittal of relevant facts.

I mean everything that I've seen, your Honor, leads me to believe that counsel and client were communicating back and forth on the deficiencies of the named insured defense and the factual weaknesses that they faced, and so I think there would be a considerable amount of communication on that.

Pure work product such as Mr. Brown's internal analysis of the named insured issue, would not be subject to production, but it would be subject to review in camera because it might contain within it facts that were communicated to him by the client. For example, if he said, "Montrose — I think we have a good legal argument that Montrose isn't a named insured, even though Mr. Wildey has told me that the loss runs and the other documents show location codes," then that — there would be certain information in there that would be subject to disclosure on a redacted basis.

And unless the court would like to hear more on those four points, I'll submit on that. But again, if we're going to go through all the factual evidence, I have a lengthy spiel.

THE COURT: Okay. Well, let's argue those and then we'll get back —

MR. CHESNEY: Sure.

THE COURT: — and rebuttal and so forth.

MR. CHESNEY: I think we'll get to a lengthy spiel in due course. I'm sure we will.

Let me try and follow the track of what Ms. Wilkes was saying, but let me begin by not doing that, but instead speaking to the last issue, because I think that is the one that's probably simplest.

THE COURT: Okay.

MR. CHESNEY: I think that the law is pretty clear, and while Ms. Wilkes may not have read our brief, we did bring it to the fore, that the — while the attorney/client may be waived — attorney/client privilege may be waived in a situation of fraud, work product is not, and I think there's no question that a review upon a proper preliminary conclusion by the court, if there may be enough evidence to justify such a review, should take place.

And my only difference with Ms. Wilkes may be that I think that unless the court is prepared to find on the basis of the evidence presented without a hearing that there actually has been fraud, then the court ought to preliminarily review everything to see whether anything, whether it's attorney/client privilege or whether it's work product privilege, can be deemed properly to be supportive of the proposition that some kind of fraud has occurred.

And my last point on that would be that I think, again, to the extent we're talking about attorney work product, particularly, I would be very uncomfortable having a trial court look at that information. I think it should be done by an independent person who is not going to be involved in making rulings in the case which would at least have the potential to be colored by whatever that person might have read in the work product of the attorneys who are trying the case. So that would be my view on the last point.

So I don't think there's a real big difference between us as to which kind of documents would and wouldn't be producible in the case of a proper showing.

THE COURT: Okay.

MR. CHESNEY: If we go back to the first one, with regard to the BP Alaska prongs, the first question is, what would the material fact be that had been misrepresented. Here what we have is are they taking a position, and Ms. Wilkes from the beginning — begins by saying, "Yeah, they took the position on the named insured issue that we weren't insured, but the insurer has an obligation to provide information to the insured relating to coverage."

Well here, if you look at the case law, there isn't any question that both sides new all of the underlying facts relating to coverage, and there wasn't anything that could be materially withheld from Montrose that related to that. They knew the policies as well as we did. Stauffer had the policy, we had the policy. The policy language wasn't secret. There were no facts that were kept secret, no facts that were misrepresented.

THE COURT: What about Nowee coming up with the findings that there was coverage and those were not communicated.

MR. CHESNEY: Well Nowee didn't come up with a finding that there was coverage. Nowee, as part of an investigation, passed on to home office his views.

THE COURT: Right.

MR. CHESNEY: There's no case law in California that says that you have to pass on the view of a particular individual within your organization who takes a particular point of view in analyzing information. Not to pass on a view that you believe to be incorrect is not fraud. There's no case in California that would even remotely say that, that by not passing on John Nowee's opinion, AMICO could be found to have committed fraud in Montrose.

THE COURT: But with regard to your duties to the insured —

MR. CHESNEY: Yes?

THE COURT: — isn't that information that they might be entitled to in order to make their determination and decision whether to proceed with what they're doing, plus all the other information that AMICO may have had with regard to its prior policies, its — how it treated, you know, these issues, and it's — I mean there's a lot of information there, a lot of factual data there as to what AMICO is doing and how they were —

MR. CHESNEY: Well I think we're getting into an interesting area because I — if that's where the court is coming from, then I think the court is coming from a direction that's probably not one that any other court has yet come from in California, because there is no law in California that would suggest that if you have an employee who is charged with a job, goes and does the job, which is part of an overall

assessment of a situation within the company, that you have to provide to your insured every piece of information in terms of the views expressed by all the various individuals up and down the line as part of deciding whether or not you believe you insured them? There isn't any law to that effect. Mr. Nowee's opinion is not a material fact that could be held or withheld.

Now had Mr. Nowee said, "I have a document here and in this document it says — notwithstanding that the language of the policy says, 'Only Stauffer and owned and controlled entities are covered. Notwithstanding that, we're basing our premium on Montrose's payroll and they are covered,' now if we withheld that, that would be fraud.

THE COURT: But didn't you have the information at this point with regard to what premiums were being charged to Stauffer, as to how that related to the number of employees, how that related to the payroll?

MR. CHESNEY: Let me speak to that briefly. That's a very good point, because what the information that we had with relation to the premium is how it was calculated, and let's not forget that the claims that we're talking about arose in the mid-1980s, and at that point, the information we had was in the underwriting file relating to how the premium was calculated, and here's what the underwriting file says, and this is 100 percent accurate representation to your Honor of what the underwriting file says. The underwriting file says, "The basis of the premium calculation for the liability policies will be the workers' compensation schedule premium, plus the payroll from monopolistic state fund states

in which Kemper cannot issue workers' comp insurance to Stauffer or related entities because of the state monopoly."

California was not, and I believe is not, but was not a monopolistic state fund, and in fact some California locations that are covered under the policies reflect the fact that they have workers' compensation insurance. California is where — one of the places for Montrose was. California is not a monopolistic state fund, so Montrose was not used as part of the premium calculation, and that's very clear from the underwriting file. So in terms of what we had from the underwriting file, we had evidence that they were not insured.

Now what did Ms. Gottschalk do about that? Ms. Gottschalk wrote to Mr. Rotrosen and said, "Look, we have a serious question about whether you're insured. Can you please provide us with any information you have that would show us that you are?" So we didn't just kick them out. In fact the big fraud in this motion, your Honor, should be evident to the court if you look at what really happened in these cases.

And let's back up and talk about when Ms. Gottschalk made her first approach. Ms. Wilkes says this was in 1985, and that's correct. But there were no coverage positions taken prior to that time by American Motorists, and the reason was as follows:

In the beginning, the first claims that arose were in connection with the Stringfellow site. Montrose presented those claims to Travelers, and for a long time, indeed a time that became so long that Mr. Mulliken began to be annoyed

about it — Mr. Mulliken being, of course, the senior partner of Latham, who's responsible for Montrose. Travelers took so long in organizing the defense of those cases that Mr. Mulliken began to press buttons and say, "Look, guys, you've got to get going on this." That led to discussions in the fall of 1985 in which American Motorists and other insureds became involved.

In November of that year, Ms. Gottschalk wrote to Mr. Rotrosen and said, "Look, we have an issue here with you folks that we need to address because we think there's a serious problem of whether you're covered. Could you give us any information that you think would show that you are?" Two weeks after writing that letter, American Motorists entered into the interim defense agreement for Stringfellow and Newman. So there's the first case.

In the case presented, or the first cases Stringfellow and Newman, it is demonstrable and undisputed that American Motorists did not withhold participation in the defense of Montrose on the basis of the named insured argument at all. It had a number of coverage disputes with Montrose, of which that was one, but it didn't withhold it on that basis, and if you go on down the line, there are no coverage disputes in which American Motorists withheld coverage from Montrose solely on the basis of the named insured argument.

Ms. Wilkes gets up and blithely tells you they tried to use this argument in order to distinguish themselves from other people. Well of course we did, because it does distinguish us from other people, because in our view, there

is a very real issue as to whether we insure Montrose. That isn't an issue with Travelers and INA and so forth. But did it make any difference to what actually happened? No, it did not, because if you look at every other case, other than Par Richmond — and I'll get to Par Richmond in a moment — if you look at every other case other than Par Richmond, you will find that we paid when the other people paid, and indeed it's within your Honor's own judicial knowledge that in the case of Alderman and in the case of what we sometimes call NOAA, that is U.S. v. Montrose, let's call the cases underlying Canadian II and Canadian III, in both of those cases, when your Honor originally summarily adjudicated the duty to defend in favor of Montrose, the carriers were already paying Montrose's defense, number one; number two, American Motorists petitioned for review of your adjudication as it related to the named insured issue. Your Honor was reversed, your order was vacated, there was no order requiring American Motorists to pay, and American Motorists paid all the way through.

Until April of this year, there was no order at all in Canadian II, the U.S. v. Montrose case, requiring American Motorists to pay, because they never brought a motion on the named insured issue in that case until early this year, and again, all the way through, American Motorists paid the defense. So the idea that there was some kind of fraud being perpetrated by the presentation of a named insured argument is a joke.

Now with regard to Par Richmond, there were a number of reasons why American Motorists believed that Par Richmond was absolutely not a covered claim, and it

was distinguished from the other claims involved here, not so much by the named insured issue, which is present in all, but by other factors related to the characteristics of that claim, which American Motorists believed made it clearly uncovered, and I still believe that right, by the way, in the sense that I think the decision that they made at the time was a correct decision.

But the basic point, your Honor, is that while American Motorists has consistently asserted the named insured defense, American Motorists has never withheld benefits from Montrose exclusively on that basis, has in fact demonstrably provided money to Montrose for the defense of cases before there was any adjudication of a named issue through the IDA agreement in Stringfellow and Newman, and has provided money for the defense of the underlying cases in Canadian II and Canadian III before there was any adjudication in those cases either.

Now that really ought to, frankly, without more dispose of this fraud nonsense, but I'm sure it won't, so let me go on.

If your Honor has any questions about those points, I'll be happy to —

THE COURT: Go ahead, I'm making good notes.

MR. CHESNEY: Thank you.

Now the next thing that Ms. Wilkes talked about were these so-called salient facts that became uncovered only

during the course of this litigation. One of her examples — and this is the problem I have with Ms. Wilkes, because your Honor is presented with stuff that's supposedly factual and then you're asked to make decisions on it, and since your Honor has to make decisions on something, you know, I have to assume you're paying attention to what she says. She says, "We suddenly find out that buy-backs of up to five million were being proposed." Oh, wow. Buy-backs were being discussed in 1989 and 1990. I know because I was there, and your Honor should know because it's in the record because Mr. Mulliken talks about it in his deposition that these things were being discussed in 1990. So how can Ms. Wilkes get up and even say to the court, "We didn't know about these things until after we filed this bad faith case and got discovery in this case"? It's a disgrace.

THE COURT: Are you referring —

MR. CHESNEY: It's a disgrace.

THE COURT: — to the discussions on buy-back or the money that was put aside with regard to the amount of the buy-backs?

MR. CHESNEY: Well your Honor's doing your best to help her out, but what she said is that, "We didn't these buy-back things until this point."

Now as far as the other issue, if you're talking about the reserving question —

THE COURT: Well the reserves is different than the buy-back, I would assume.

MR. CHESNEY: Well if it's different, that's fine then. I was talking the buy-back discussions, which took place in — and Mr. Mulliken was there. I was there. There's nothing wrong with buy-back discussions.

THE COURT: Well, no, the issue that I — you're saying the buy-back was discussed in the early '90s —

MR. CHESNEY: Right.

THE COURT: — and my question was it as an esoteric discussion or was it actually money discussed to the point where AMICO was saying, you know, "We'll pay this much."

MR. CHESNEY: Yes, that was discussed and Mr. Mulliken testified to that.

THE COURT: The $5 million.

MR. CHESNEY: I don't think that was the figure. I think it was more like three that he testified to at that time. That's my recollection of his testimony.

THE COURT: Okay, but —

MR. CHESNEY: On the basic issue, yes, the numbers were discussed. Absolutely they were discussed. We couldn't very well talk about it without discussing the numbers.

Now Ms. Wilkes says, "This proves that they knew they insured Montrose." Well that's kind of a odd argument

to me because it's certainly not something that the court could properly infer because the discussions never involved Montrose alone. They involved our actual insured, Stauffer. But if we're going to buy back the policies, we have to buy back any potential claims that are going to be forthcoming, and Montrose was sitting out there and making claims against us. So they had to be involved in those discussions. There wasn't any other way to buy back the policies with any security for American Motorists since Montrose was continuing to sue under them. So it doesn't suggest that we insured them; it suggests we were trying to solve the problem if we could by a universal buy-back of the claims.

Now, then Ms. Wilkes says, "The reserve information is indicative of the fact that they knew they insured us all the time, and that shows that they were engaged in some kind of fraudulent conduct." Well again, that too is complete nonsense, because as we have shown in our papers, the actual reserve information that's in there reflects a whole bunch of different things, which Montrose is at pains to confuse and not separate, and those things are: Number one, that a number of the figures that they refer to involve all claims made by Stauffer and Montrose; number two, the defense or expense reserves are adjusted from time to time to reflect actual costs that have been incurred or that are anticipated reasonably to be incurred in the near future due to one of a couple of things. One would be the IDA in Stringfellow and Newman. If you're party to an IDA, you know you're incurring defense costs and you know you're going to incur defense costs, and therefore, you have reserves.

Now the IDA, by its terms, explicitly reserved to all the parties the coverage positions, including the position

that we don't insure you folks at all. That's why the coverage litigation had to take place, because all of those issues were reserved. But meantime, we were paying. Now after the affirmance of Judge Wisot's order, that had to be done also because there was an outstanding order that required us to make payments in the Canadian I cases, and so you had to have reserves to reflect the fact that you were making those payments. It's legally required. You can't just pay money and say, "Well, it didn't go anywhere. I don't need to reserve for it, and I'm not going to reserve for the money that the court says I have to pay." That's not evidence we know we insured Montrose; it's evidence that Judge Wisot was affirmed, and as the Court of Appeals said in the appeal from your Honor's decision in the Canadian III case, the affirmance of Judge Wisot's order was done in such a manner that it didn't permit for and didn't allow of and didn't involve the appeal of the named insured issue, which was a quite separate issue.

Excuse me, your Honor. If I may.

(Pause on record)

MR. CHESNEY: Now the last —

THE COURT: Incidentally counsel, with regard to the time elements, if you want to go through or if you want to take a break for anything, just let me know.

MS. WILKES: Thank you, your Honor.

It's up to you, John.

MR. CHESNEY: No, I just had a frog in my throat for a minute.

MS. WILKES: Yes, whatever you're comfortable with.

MR. CHESNEY: I have removed the amphibian in question and I'm ready to continue.

The last piece of damning evidence that Ms. Wilkes referred to was a handwritten note scribbled by Mr. Wildey to Mr. Valloy, and on it he does — the language does say he's sending to Mr. Valloy a report from counsel on claims being made by Stauffer and Montrose, and in his scribbled note he says the coverage for Montrose flows from — or something — grows out of the Stauffer policies. Now what he should have said, obviously, was the claims by Montrose grow out of those policies. He used the word coverage. They say this is proof that Wildey knew all along that American Motorists insured Montrose. That is about the most laughable contention as a basis for fraud I have ever heard in my life, and let me tell your Honor why.

First, it's a scribbled internal note attaching another document. Second, it's Mr. Wildey writing to the home office examiner who was monitoring the claim at the time.

Now, does anyone in his right mind really believe that if Mr. Wildey had done an about-face on the position of coverage that Kemper was taking there wouldn't have been one whole hullabaloo, and does anyone really believe that Mr. Wildey is going to advise Mr. Valloy that Montrose is covered in a casual scribbled note when for years we've been

arguing that Montrose is not an insured? It begs for credulity. Now, with regard to indemnity rights, or indemnity reserves, which were something else that Ms. Wilkes mentioned, with regard to the issue of indemnity reserves, the reserves that Montrose is seeking to suggest to the court are reserves for indemnity obligations are no such thing. They are reflected as reserves for possible settlement — overall global settlement of the outstanding claims through the buy-back of policies, and again, whether or not that was a proper way to reserve would be one issue, but what it in fact was is not an issue. What is [sic] was was a reserve that was established to reflect the ongoing discussions that it was thought at the time might lead to a global resolution of the claims. So there are no indemnity reserves as such established.

I just want to make sure I let your Honor make the notes before I —

THE COURT: No, no, keep going.

MR. CHESNEY: — proceed to the next issue.

Then your Honor talked about the Worley case, and I heard Ms. Wilkes say an awful lot of things, but I'm not really sure she said anything that relates to the Worley case, because AMICO has all along asserted a number of defenses to the claims that Montrose has asserted, and as she says, it has indeed been consistently asserted. It was asserted or raised as an issue before the initial IDA in Stringfellow was entered into, and it's been asserted ever since, and interestingly enough, although your Honor is now asked to conclude that American Motorists have advanced this

defense fraudulently, the Court of Appeals hasn't yet decided whether it's an issue that needs to be tried. It hasn't yet been finally decided by any court in the country.

When Montrose says that we are extremely stubborn because we continue to litigate this issue, well, I have never heard anyone draw an inference of fraud against a party on the basis that they have appealed a decision. So it can't be the fact that we continue to litigate it. That has to stand independently to the side and Montrose has to show extraneously to that fact fraud. You can't say it's fraud to appeal a trial court decision, even from a judge as distinguished as your Honor. That's a right that a party has and properly exercises.

Now as to the Worley case again, there are a whole number of different defenses that have been asserted, and to the extent there is no evidence that there was an entire array of fraudulent defenses, I think that's a problem that they can't surmount, and I haven't yet heard Ms. Wilkes say anything at all about how they go about surmounting that one. Now there are a number of things here that I'll just mention as pick-ups because these really, again, are things, your Honor, which I believe go to the heart of the matter, which is that Montrose comes in here repeatedly, makes assertions through its counsel to the court which are not supported properly by evidence and then asks the court — and I regret to say has done so with more success than I think would make me happy — but ask the court to make decisions based on these wild assertions. For example, it says that American Motorists, as Ms. Wilkes put it, never raised a named insured issue until 1985. Well, there were no raising of any issues by anyone

until 1985 because as I said earlier, Travelers was supposed to be handling the putting together of the defense of the Stringfellow and Newman cases, and only once it became clear to Mr. Mulliken that Travelers was falling down on the job did other carriers start to be involved directly in those discussions.

Then Ms. Wilkes testifies as to what Mr. Wildey said with regard to set-up of claims, and she testified inaccurately, and I would like to cross-examine her on the untruthfulness of her testimony to the court under the guise of argument. How do I do that? She says in 1989 all of the sudden in Par Richmond Mr. Wildey writes and says, "Hey, we have a named insured problem with you guys and Par Richmond. This is a new deal." Well, how do I cross-examine her on the untruthfulness of that testimony? I guess that one, I don't need to because the fact of the matter is if the court would take a look at the pleadings, you will find that it was raised in the initial pleadings in the Par Richmond case. It's been raised in every pleading American Motorists has ever filed. Every single pleading.

I think I'll leave it there for now, unless the court has any argument, because I did — any other questions, because I did speak to the last issue that was addressed by the court first. Maybe now we can proceed to the next issue.

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